THE UNIVERSITY OF ALBERTA

ASPECTS OF THE DEVELOPMENT OF SECURITIES REGULATION OF TAKE-OVER BIDS IN ONTARIO AND ALBERTA SINCE 1967

by

© JOHN T.D. COURTRIGHT

LL.B., B.A., QUEEN'S UNIVERSITY, KINGSTON

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This thesis is dedicated to Pamela Heard whose support and confidence made it possible.

ABSTRACT

This thesis describes and analyzes the development of the securities regulation of take-over bids in Ontario and Alberta from the events that led to the initial legislation in 1967 up to the present day. The focus is on the policy reasons and theoretical basis for the tremendous increase in such regulation. Government reports and actual take-overs are referred to throughout. Two significant changes, the introduction of the follow-up offer obligation and the restriction of the stock market purchase exemption, are examined in detail.

The prime motivation behind the securities regulation of take-over bids is to protect the offeree shareholders. The motivation is laudable and the present legislation provides a great deal of protection to offeree shareholders. It is discovered, however, that many of the changes are a reaction to perceived abuses of the regulatory scheme and may have taken place without sufficient consideration of their theoretical bases or economic consequences. For this reason many of the developments are quite controversial.

The thesis provides all the background necessary to understand the controversies and the reader may draw his own

conclusions, but in the writer's opinion the securities regulators have been over zealous in their regulation of take-over bids and some of the developments in this field should be reconsidered and modified to lessen their adverse effects on business.

PREFACE

Take-over bids were not subject to substantial regulation in Canada until 15 years ago with the introduction of The Securities Act, S.O. 1966, c. 142 which was proclaimed in force May 1, 1967 (hereinafter the "Old O.S.A."). This is surprising considering the number of articles in the financial pages and even the front pages of Canadian newspapers on take-over bids. Indeed, regulation of contested take-over bids has become the most visible, demanding and controversial function of the Ontario Securities Commission.[1]

This increase in the regulation of a vital component of the capital markets in Canada is worthy of study both for its own sake - because of the dollars involved - and because of its import both for securities regulation and for government regulation in general. This thesis studies this increase in the regulation of take-over bids by identifying changes in such regulation in Ontario and Alberta between 1967 and the present. The methodology is to follow the development of such regulation in a chronological progression. The relevant government reports are studied thoroughly and practical examples are used wherever possible.

Ontario has been the traditional leader in securities regulation in Canada and the paper concentrates on developments in Ontario with references and comparisons to Alberta where appropriate. Developments in Britain, the United States and at the federal level in Canada are also referred to if they have had a significant effect in Ontario or Alberta.

The development, theoretical basis and enforcement of significant changes such as Ontario's follow-up offer obligation and the restrictions on the stock market purchase exemption are examined in detail to uncover the underlying themes, issues and problems of the securities regulation of take-over bids.

Unless the context implies otherwise both the offeror and the target or offeree company are public, distributing companies trading on a Canadian stock exchange. It should be noted that the section numbers in Part IX of the Old O.S.A. moved forward one number in the Revised Statutes of Ontario, 1970. References to the Old O.S.A. in Chapter III and thereafter use the section numbering from the Revised Statutes.

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LIST OF ABBREVIATIONS

"A.B.C.A."	-	Alberta Business Corporation Act, S.A. 1981, c. B-15.
"Amex"	-	American Stock Exchange.
"C.B.C.A."	-	Canada Business Corporations Act, S.C. 1974-75, c. 33.
"C.C.A."	-	Canada Corporations Act, R.S.C. 1970, c. C-32, as amended by c. 10 (1st Supp.).
"Dickerson Report"	-	Dickerson, Howard and Getz, Proposals for a New Business Corporations Law for Canada (1971).
"Hodgson Report"	-	Ontario Legislative Assembly Select Committee on Company Law, Report on Mergers, Amalgamations and Certain Related Matters (1973).
"Kimber Report"	-	Report of the Attorney General's Committee on Securities Legislation in Ontario (1965).
"Merger Report"	-	Report of the Committee of the Ontario Securities Commission on the Problems of Disclosure Raised for Investors by Business Combinations and Private Placements (1970).
"New A.S.A."	-	The Securities Act, 1981, S.A. 1981, c. S-6.1.
"New O.S.A."	-	The Securities Act, 1978, S.O. 1978, c. 47.
"O.S.C."	-	Ontario Securities Commission.
"Old O.S.A."	-	The Securities Act, S.O. 1966, c. 142.

"Porter Report"	-	The Report of the Royal Commission on Banking and Finance (1964).
"Regulations"	-	Regulations made under the New O.S.A., being Ontario Regulation 478/79 as amended.
"S.E.C."	-	The Securities and Exchange Commission, an agency of the U.S. Government.
"T.S.E."	-	Toronto Stock Exchange.

CHAPTER I

POTENTIAL FOR "MISCHIEF" IN A TAKE-OVER BID

> "The take-over bid is perhaps the most dramatic occurrence in corporate life. Its success or failure often has incalculable consequences for affected parties. Because of this dramatic quality, abuses or inequities that occur in connection with such bids often achieve great notoriety"[2]

In general terms a take-over is the acquisition of control of one company, the target company, by another. A take-over bid, again in general terms, is one technique used to carry out a take-over and consists of an offer by the acquiring company to buy sufficient shares of the target company to achieve the desired degree of control. Other techniques include amalgamations and asset purchases.

As noted above, take-over bids first became the subject of substantial regulation in Canada with the introduction of the Old O.S.A. in 1967. The principal purpose justifying such legislation is to ensure that the shareholders of the offeree company are protected.[3] It is useful in understanding why such legislation was thought necessary to contrast it with other take-over techniques and to analyze the basic take-over bid.

There are essential differences between a take-over bid and a take-over through an amalgamation or asset purchase. First, in a take-over bid for effective control only part of the outstanding share capital of the offeree company has to be purchased. In an amalgamation all outstanding shares of the target company must be dealt with by exchanging them either for shares in the new amalgamated company or some other consideration. Similarly, in an asset purchase all or substantially all the assets of the target company must be purchased. Second, a take-over bid does not necessarily require either the approval of the board of directors of the offeree company or acceptance by a majority of the shareholders of the offeree company. Both an amalgamation and an asset purchase, however, must be approved by both the board of directors of the target company and by a special resolution of the shareholders.[4] Third, and perhaps most importantly, the very nature of the take-over bid technique makes the unfair and unequal treatment of the shareholders of the offeree company easier than the use of other techniques.

The technique rests, very simply, on contracts of purchase and sale.[5] The offeror makes offers to those shareholders of the target company whose shares it wishes to acquire. Each shareholder who accepts the offer enters into a binding agreement to sell the shares on the terms offered.

Take-over bids fall into two main categories: bids for all the shares of the offeree company, or all the shares of a certain class; and bids for a certain specified percentage of such shares - partial bids. In both types of bids the offer is usually conditional on obtaining sufficient acceptances to achieve the desired degree of control and thus avoid the risk of not achieving this control but still being obligated to purchase the shares that were tendered.

If the bid is for all the shares it will most commonly be conditional on acquiring at least 90 percent of the shares not held by the offeror in order to take advantage of the corporate statutes permitting the compulsory acquisition of the remaining shares.[6] In a partial bid the offer will most commonly be conditional on obtaining sufficient acceptances to acquire simple legal control at 51 percent. There are, of course, many other possibilities. For instance the offeror may only be seeking effective control in a widely held company, which might rest with as little as 20 percent of the shares, or the offeror may want to increase his ownership so as to guarantee the passage of special resolutions and seek two-thirds of the shares in aggregrate or whatever percentage of the offeree company might be required for this purpose.[7]

The offeror generally reserves the right in the

offer to declare the bid unconditional if the desired level of acceptances is not achieved. Further, the offeror generally reserves the right in the offer to extend the time that it will remain open for acceptance and to increase the consideration offered.

The foregoing is only a crude sketch of the take-over bid technique. The situation can be considerably complicated by one or more of several different factors. For example:

(i) the consideration offered by the offeror may be cash, securities of the offeror or a combination thereof;

(ii) there may be one or more competing bids; or

(iii) the offeror may augment the bid by purchasing shares of the offeree company on the stock exchange during the bid.

One complicating factor is deserving of special mention: the possibility of conflict between the interests of the directors of the offeree company, who are in a unique position to facilitate, thwart or take advantage of the bid, and the interests of the other shareholders. The likelihood

of such conflict tends to increase as the level of ownership of the directors of the company decreases.[8]

The practical result of this take-over bid technique for the shareholders of the offeree is that they may receive less than they should for their shares and that they may not be treated equally. The primary problem is one of information. The shareholder may not have sufficient information concerning the true value of the offeree company to determine whether the consideration offered is fair. The shareholder might want to retain his shares but be uncertain whether to do so because he has no idea what the offeror's intentions are with respect to the offeree company should the bid be successful.

Another major problem has to do with timing. The shareholder may be stampeded into accepting a bid, even when adequate information is available, if the bid is a partial bid and on a first-come first-served basis or the bid is only open for a very short period. Following basic contract principles, the shareholder may loose out on some consideration if he accepted early and the offer is subsequently amended to provide increased consideration. Further, a shareholder may accept an offer and be locked in at the mercy of the offeror for months - possibly missing out on a competing bid - only to have the offer remain conditional and lapse.

A further problem concerns the directors or controllers of the offeree: they may abuse inside information by purchasing other shareholders' shares before the take-over bid is made public; they may successfully resist a favourable bid solely to maintain control and thus deprive other shareholders of a chance to sell their shares; or they may exact a dis-proportionate amount of the consideration passing from the offeror to ensure the success of the bid.[9]

Take-overs, and take-over bids in particular, are not inherently good or bad. A fundamental principal of a free enterprise economy is that the most efficient allocation of resources will result when each individual player is free to pursue his own economic advantage. It follows, therefore, that in a free enterprise economy a player of sufficient means who feels that the value to him of the assets of a company is greater than the value placed upon those assets by the existing shareholders and the investing public should be entitled to attempt to persuade those shareholders to transfer control of those assets to him.[10] Take-over bids can have positive advantages to the companies involved, to their shareholders and to the economy generally and, provided their is no unfair dealing in relation to the existing shareholders, securities and corporate law should permit take-over bids.[11] This is not to suggest, however, that

there are no competing policy choices in this area. As Johnston points out:[12]

> "Particular take-over bids may, for example, lead to monopolies or oligopolies in restraint of trade, or to increase foreign ownership in a given industry. Measures designed to regulate or combat such developments are appropriately left to statutes which embody distinct policy choices in these areas."

Nor is the writer suggesting that take-over bids are always advantageous. The purpose behind a take-over bid may be to loot the target company, or the economic advantage sought may not materialize and the offeror may go bankrupt. In addition, the economy may suffer if a spate of take-overs affects the exchange rate or drives up interest rates.

A special body of securities law has grown up to protect existing shareholders of offeree companies against unfair dealings in take-over bids because, as we have seen, the technique has the potential to harm them. Such remedial legislation may not necessarily be beneficial, however, if it has incidental effects which are more harmful to the capital markets and the economy generally than the attainment of the intended objective - protecting the offeree shareholder - would be beneficial.[13] This should be borne in mind when examining the securities regulation of take-over bids.

CHAPTER II

THE 1967 LEGISLATION

Concern in Canada over the dangers to the interests of the offeree shareholders in a take-over bid resulted in 1963 in a voluntary code of procedure for take-over bids. The code was adopted after consultation among members of the executive committees of the Trust Companies Association of Canada, the Investment Dealers Association of Canada and the Stock Exchanges.[14] This move toward self-regulation was based on the British experience where the first version of what is now the City Code on Take-overs and Mergers was promulgated in 1959.[15] Because the code was voluntary and without legal sanction, it was as frequently honoured in the breach as in the observance.[16] The voluntary British Code was apparently more effective because the participants there were under either the direct or indirect control of the Board of Trade.[17] In the United States at this time take-overs were most frequently accomplished by means of proxy-solicitations and there was not the same concern with take-over bids.[18] In any event, it was only cash take-over bids which were unregulated in the United States because if the offeror offered securities in consideration the elaborate prospectus provisions of the U.S. securities legislation would apply. Further, the United States already had effective insider trading regulation at this time.[19]

This increasing concern with take-over bids, particularly the take-over bid by Shell Oil Company of Canada Limited for Canadian Oil Company Limited about which numerous allegations of trading by persons with confidential knowledge were made,[20] was also one of the principal stimuli for the appointment by the Attorney General of Ontario in 1963 of a committee headed by the chairman of the Ontario Securities Commission to recommend up-to-date securities legislation[21] - the Kimber Committee. In 1964 The Report of the Royal Commission on Banking and Finance (hereinafter the "Porter Report") which, rather surprisingly,[22] made extensive comments on securities regulation, recommended the enactment of a statutory code modelled on the largely ineffective voluntary one.[23] In 1965 the Kimber Committee recommended a complete revision of the Ontario Securities Act including statutory provisions to regulate insider trading and take-over bids.[24] The Kimber Report, along with the Porter Report and several additional reports released about the same time,[25] gave the Ontario legislature the impetus to act rapidly and the Old O.S.A. was passed in 1966. The Old O.S.A. was followed by the four western provinces - Alberta, British Columbia, Manitoba and Saskatchewan, was a model for amendments to the Canada Corporations Act and influenced changes made to the Quebec Securities Act in 1971.[26] The Old O.S.A. is virtually identical to the former Alberta Securities Act,[27] and the Old O.S.A. will be cited throughout for convenience.

A. Definition of Take-Over Bid

It was noted above that the primary purpose behind the provisions in the legislation regulating take-over bids, Part IX of the Old O.S.A., is to provide protection to shareholders of the offeree because of the dangers to which they are exposed in a take-over in which the take-over bid technique is used. Before describing the protection offered by the legislation we have to examine the definition of take-over bid used to determine when this protection comes into play.

The legislation is designed to regulate a certain technique[28] and the definition exempts offers which, while they may result in the acquisition of legal or effective control, did not, in the Kimber Committee's opinion, give rise to the dangers to the interests of the offeree shareholders that the take-over bid technique did. Further, the Kimber Committee opted for precision by setting an arbitrary threshold level for the acquisition of effective control reflecting a policy decision not to regulate the technique unless the offeror either already had effective control or was attempting to acquire it. The definition of take-over bids and associated terms in the Old O.S.A. read as follows:

Subsection 80(g) - "take-over bid" means an offer, other than an exempt offer, made to shareholders the last address of any of whom as shown on the books of the offeree company is in Ontario to purchase such number of equity shares of a company that, together with the offeror's presently-owned shares, will in the aggregrate exceed 20 percent of the outstanding equity shares of the company.

Subsection 80(b) - "exempt offer" means,

(i) an offer to purchase shares by way of private agreement with individual shareholders and not made to shareholders generally,

(ii) an offer to purchase shares to be effected through the facilities of a stock exchange or in the over-the-counter market,

(iii) an offer to purchase shares in a private company or in a public company that has fewer than 15 shareholders whose last address as shown on the books of the offeree company is in Ontario, two or more persons who are joint registered owners of one or more shares being counted as one shareholder, or

(iv) an offer exempted by order of a judge of the High Court designated by the Chief Justice of the High Court made pursuant to section 89.

Subsection 80(e) - "offeror" means a person or company, other than an agent, who makes a take-over bid, and includes two or more persons or companies,

(i) whose take-over bids are made jointly or in concert, or

(ii) who intend to exercise jointly or in concert any voting rights attached to the shares for which a take-over bid is made.

The definition is certain enough so that a potential bidder will know whether he must conform to the regulation and find it very difficult to argue, once caught, that he does not come within the definition. The 20 percent

is an aggregate of the offeror's presently owned shares coupled with the shares the offeror will acquire if the bid is successful and "offeror" and "offeror's presently owned shares" are both defined broadly.[29]

The 20 percent cut-off might miss an unusual company in which less than 20 percent would give effective control, but it is a reasonable compromise between the British position at this time where bids for less than 51 percent required special dispensation and take-over bid was defined as an offer to buy 51 percent made to more than one holder,[30] and the proposed Amercian legislation to regulate cash tender offers for more than five percent of the shares of a company and requiring extensive disclosure of any owner of more than ten percent.[31] One criticism of the definition is that it equates control with a percentage of the voting shares outstanding rather than a percentage of the total votes attached to shares outstanding. It is thus theoretically possible, provided different classes of shares have different voting rights, for an offeror to acquire legal control of an offeree company without making a "take-over bid".[32]

Most of the criticism of the definition focused on the exemptions, in particular the private agreement exemption found in subsection 80(b)(i).[33] The criticism is of two

aspects of this exemption. First, the exemption is not restricted numerically, but only by the phrase "not made to shareholders generally". The only guide is probably the interpretation of the prospectus exemption where the distribution of securities is not made to the public, and the interpretation of that exemption is anything but clear.[34] The vagueness of the exemption means that unless it is interpreted strictly offerors making individual agreements with large numbers of shareholders would be exempt from regulation.

Second, the private agreement exemption allows the sale of control by the controllers at a premium not available to the other shareholders. The Kimber Committee felt that the evolution of a legal doctrine which might impose a fiduciary duty upon controllers toward other shareholders was, apart from insider trading aspects, a matter to be left to development by the judicial process.[35] This was clearly a policy decision on the part of the Kimber Committee, transfers of control by private agreement were not to be regulated. Whether this decision was or continues to be justified will be dealt with when various legislative reforms in the initial take-over bid provisions are discussed.

The private agreement exemption appears to be justified on the basis that if the offeror can acquire

effective control or consolidate such control by negotiating for the shares of just a small number of shareholders, then those shareholders are in an equal bargaining position with the offeror and do not require statutory safeguards to protect their interests. The exemption in subsection 80(b)(ii) for offers to be effected through "a stock exchange or in the over-the-counter market" and the exemption in subsection 80(b)(iii) for "offers to purchase shares in a private company or in a public company that has fewer than 15 shareholders" are both justified on a similar basis - the shareholders in these situations do not require statutory safeguards.

In a stock exchange or over-the-counter purchase the theory is that the free market forces will protect the shareholder. He is free to enter the market or not as he sees fit. In a private company or a public company with few shareholders the theory is that the shareholders will be closely associated with one another and thus all will be able to respond in an informed way so as to present a common bargaining front.[36]

The inclusion of an exemption for public companies with less than 15 shareholders is redundant in light of the private agreement exemption. The exemption for a private company is also subject to criticism on the grounds that it

is somewhat artificial. If a company is public with 16 shareholders the take-over bid provisions must be complied with, but if a company is private with 50 outside shareholders and hundreds of employee shareholders the offer will be exempt.[37]

Subsection 80(b)(iv), which provides for an exemption on application to the Court, appears to have been inserted simply as a safety valve in case the other exemptions were not broad enough.

B. Take-Over Bid Rules

The objective of Part IX, protecting the offeree shareholders in a take-over bid, is accomplished by:[38]

(i) by requiring that the offeree shareholders be furnished with sufficient information to assess the merits of the bid;

(ii) by imposing "time for acceptance rules" to ensure that the offeree shareholder has sufficient time to assess the information and make a reasoned decision; and

(iii) by stipulating that certain conditions form part of the terms of all take-over bids.

1. Time for Acceptance Rules

The Kimber Committee felt that the principal purpose justifying take-over bid provisions was to ensure that the offeree shareholders were given adequate relevant information and a reasonable period of time in which to assess such information. They recommended that all take-over bids be required to be left outstanding for a specified minimum period of time.[39] Further, they felt it essential that management of the offeree company have ample opportunity to inform the shareholders of its analysis of the take-over bid.

Part IX[40] provides, therefore, that all bids must remain open for at least 21 days and prohibits the offeror from taking up and paying for any shares within the first seven days. Time is measured from the time the offer is sent by pre-paid registered mail to the offeree.[41] The offeree is given the right within the first seven days to withdraw his acceptance. This latter provision is particularly designed for the small unsophisticated investor who may deposit his shares without advice from the directors of the offeree company or his broker.[42] The sophisticated investor will wait until the end of the 21-day period before tendering, particularly in a partial bid, both because if the market is rising he may wish to sell all his shares in the

market rather than only have part of his shares taken up under the offer and there may be a competing bid for greater consideration.

There is no maximum time limit on bids, except for partial bids. This was criticized as possibly leading to absurdly long periods before shares were taken up and paid for, particularly when deposited shares could not be withdrawn after the first seven days.[43] There was also the possibility, in either an offer for all the shares or a partial offer, that the offeror could insert a "market-out" clause along the lines used in an underwriting agreement and thus reserve to himself considerable discretion whether to terminate the offer without liability.[44] This failure to provide a maximum limit on the time which the offer remains open presumably exists in order to allow an offeror to take advantage of corporate statutes permitting the compulsory acquisition of minority shareholdings if 90 percent of the shares not held by the offeror are acquired within four months.[45]

The rules in partial bids are slightly different. The bid can only remain open for a maximum of 35 days and the shares deposited must be taken up and paid for within 14 days after the last day for deposit. Further, the offeror is prohibited from taking up and paying for shares until at

least 21 days have elapsed and if more shares are deposited than bid for they must be taken up pro-rata unless the offeror changes his mind and decides to take all the shares tendered.[46] The special partial bid rules do not apply if the bid is for all the shares of one class of a company and there are other classes of shares in the company.[47] In addition, a problem arises if there is a bid for all the shares which is converted to a partial bid. It would be very difficult, both from a practical and a contract law viewpoint, to know how to take up shares on a pro-rata basis if some shares had already been taken up and paid for, but the legislation would seem to require it.[48]

2. Disclosure Requirements

Part IX of the Old O.S.A. requires that every take-over bid be accompanied by a take-over bid circular and sent by prepaid mail to each offeree shareholder.[49] The circular must contain certain prescribed information designed to enable the offerees to make an informed decision whether to accept or reject the offer. If the consideration offered in the bid consists in whole or in part of securities, additional information like that in the appropriate form of prospectus must be included in the take-over bid circular.[50]

Directors of the offeree company are not obligated to make any response to the take-over bid, but if they choose to recommend acceptance or rejection of the bid they must send a directors' circular to each offeree shareholder containing certain prescribed information.[51] The purpose of the directors' circular is to communicate the directors' recommendation with some supporting detail and to ensure that all possible conflicts of interest are disclosed. Both bid circulars and directors' circulars must be approved and their delivery authorized by the board of directors, respectively, of the offeror and the offeree company.[52] In addition, any report, opinion or statement of an expert in a take-over circular or a directors' circular must be accompanied by the expert's written consent.[53]

(a) Contents of the Take-Over Bid Circular[54]

(i) The number of securities of the offeree company owned and controlled by the offeror, associates of the offeror, each director and senior officer of the offeror and their associates, and any person or company owning equity shares carrying more than ten percent of the voting rights attached to the outstanding equity shares of the offeror;

(ii) the number of shares in the offeree company traded

by the persons or companies named in (i) for six months prior to the bid including the purchase or sale price and dates;

(iii) the particulars of any conditional offer dependant on the number of shares deposited;

(iv) particulars of the method and time of payment for the shares of the offeree;

(v) a statement that deposited shares may be withdrawn for seven days from the date of the bid;

(vi) details of the arrangements in cash bids to ensure funds are available;

(vii) if possible, a summary showing volume and price range of shares of the offeree company in the preceding six months;

(viii) particulars of any arrangement or agreement made or proposed between the offeror and the directors and senior officers of the offeree company; and

(ix) particulars of any information known to the offeror that indicates any material change in the

financial prospects of the offeree company since the last published financial statement of the offeree company.

Further, as noted above, if the consideration consists in whole or in part of securities the take-over bid circular must include the information that would be included in a prospectus of the company whose shares are offered. The information must be in the form of prospectus provided in the regulations that will provide the most significant information about the company.[55] Note that an actual prospectus is not required because of the prospectus exemption in section 58 of the Old O.S.A. Also required are financial statements of the company and the particulars of any information known to the offeror that indicates any material change in the financial prospects of the company since its last published financial statement.

The requirements of the take-over bid circular go a long way towards providing the information that the offeree shareholders require. Comments on the provisions are on two bases: that the disclosure should go further; and that the circulars should be reviewed and approved by the Securities Commission prior to distribution.

There is no requirement that the offeror's identity

has to be revealed in a cash bid. Identification was considered and rejected by the Kimber Committee. They reasoned that any benefits to the offeree were outweighed by the danger of discouraging bids by those who wished to remain annonymous and that the primary influence on the offeree shareholders was price.[56]

Another observation on the contents of the bid circular is that there is no requirement that the offeror disclose its purpose in making the bid and its plans for the offeree company. This information may be of great significance to an offeree shareholder, particularly in a partial bid. The proposed American legislation at this time to regulate cash tender offers, which was eventually passed as the Williams Act, required that the offeror disclose such information.[57]

This observation is related to another, namely that pursuant to item (ix) above the offeror only has to furnish the offeree shareholders with the type of information they would eventually receive from the management of their company. The required financial statements may not give a good indication of the true value of a company's assets.[58] If the offeror's bid is based on a plan to utilize such assets to realize their full potential,[59] it is arguable that this plan be disclosed to offeree shareholders in order

that they may make an informed decision. The counter-argument is that mandatory disclosure of this nature may discourage offerors, who do not want to give the benefit of their talent and ideas to either competitors or the management and directors of the offeree, and thus result in a less efficient allocation of resources.

With respect to the comment that take-over bid circulars should be reviewed and approved by the Securities Commission prior to circulation, the Kimber Committee recognized that a share exchange bid did not really differ from the primary distribution of securities to the public, but they felt that the same procedure should be applicable to both cash and share exchange take-over bids.[60] Further, they felt that the importance of speed and secrecy to a take-over bid or counter-bid mandated against a requirement that a take-over bid circular be reviewed and approved.[61] At first the offeror was only required to file a take-over bid circular with the Securities Commission within five days after sending it to the offerees,[62] but this was changed in 1968 so that it had to be filed simultaneously.[63]

The counter-argument to the Kimber Committee's position is that this may deprive the offeree shareholders of any real protection in an uncontested take-over bid because deficiencies in the circular may never come to light.

Further, the legislation did not extend the statutory civil liability for misrepresentation that was applicable to prospectuses to the take-over bid circular.[64]

A closely related issue is whether the offeror should be required to submit the bid to the offeree company prior to submitting it to the offeree shareholders. The British rules at this time required this to be done at least three clear business days prior to the mailing to the offeree.[65] The original proposal for the Williams Act would have required this to be done 20 days in advance in cash bids. The S.E.C. recommended, instead, that the offering material be filed with the Commission five days in advance on a confidential basis, so as to provide for a legal review without giving a hostile management an unfair advantage.[66] The Kimber Committee recommended against mandatory prior notification of the offeree company both on the basis that it would hinder the success of bids in some instances, and that in strict legal theory an offer to buy shares does not concern the company in which the shares are held because they are the personal property of the shareholders.[67]

It should be noted that the Kimber Committee recommended that anyone should have access to a shareholders list on seven days notice.[68] This was in keeping with

the philosophy that take-over bids in themselves were neither good nor bad[69] and the subsequent enactment of this recommendation,[70] coupled with the right of withdrawal for the first seven days, provide a considerable period of time for directors of the offeree company to prepare a response to a bid.

(b) Directors' Circular

Some of the information required in a take-over bid circular could be more suitably furnished by the directors of the offeree company, but the shareholders might never receive the information if it were left to the directors' circular because they are under no legal obligation to send a directors' circular unless they "recommend acceptance or rejection" of a bid.[71] What the quoted phrase means is that an overt expression of an opinion will require a directors' circular, but it is not clear whether a more or less covert recommendation or actual activities to either support or defend against the bid require a directors' circular. The required contents of a directors' circular are:[72]

(i) the number of securities of the offeree company owned or controlled by each director and senior officer of the offeree company and any person or

company owning equity shares carrying more than ten percent of the voting rights attached to outstanding equity shares of the offeree company;

(ii) a statement as to whether each of the persons or companies named in (i) has accepted or intends to accept the offer;

(iii) if the offeror is a company, the number of securities of the offeror owned or controlled by each person or company named in (i);

(iv) the particulars of any arrangement made or proposed between the offeror and any directors or senior officers of the offeree company;

(v) whether any person or company named in (i) has any interest in any material contract to which the offeror is a party;

(vi) a summary, if reasonably ascertainable and not adequately disclosed in the take-over bid circular, showing volume and price range of the offeree company's shares in the preceding six months;

(vii) particulars of any information known to any of the

directors or senior officers of the offeree company that indicate any material change in the financial prospects of the offeree company since the last published financial statement of the offeree company; and

(viii) the particulars of any other material fact not disclosed in the foregoing.

In general the requirements for the contents of the directors' circular cover the problem of insider trading. It should be noted, however, that while the offeror and insiders of the offeror must disclose both their holdings in the shares of the offeree and their trading in such shares in the previous six months in the take-over bid circular there is no corresponding requirement on the insiders of the offeree company to disclose their trading in the securities of the offeror in the previous six months, only the total number of shares owned and controlled. Trading in shares of the offeree by the insiders of the offeree would, of course, have to be reported pursuant to the insider trading provisions in the Old O.S.A., Part XI.

As with the take-over bid circular, there is no requirement that the directors' circular be reviewed and approved by the Securities Commission prior to circulation

and the comments concerning take-over circulars in this regard are equally applicable to director's circulars.

3. Terms to be Included in all Take-Over Offers

One such provision was already noted under the timing rules, that in all partial bids the shares must be taken up on a pro-rata basis if more shares are tendered than are sought and the offeror does not wish to take them all up.[73] The pro-rata rule eliminates any motive to rush to accept a take-over bid, allowing the offeree shareholders time to assess the available information before tendering. Further, it guarantees fairness among the offeree shareholders by enabling all of them to participate in the offer.[74]

Another very important term that is part of all take-over bids is that if at any time during the bid the consideration offered is increased the offeror shall pay such increased consideration to each offeree whose shares are taken up.[75] The rule guarantees fairness among the offeree shareholders and by doing so indirectly aids the offeror because offeree shareholders will be more likely to tender their shares if they know holding back will not result in any increased consideration. A major problem can develop, however, in determining whether a bid has expired before the

consideration was increased.[76] Further, the offeror could avoid the application of the rule by purchasing shares of the offeree company on the stock exchange during the bid,[77] though it is not likely that the market price would exceed that offered in the bid.

4. Enforcement

Compliance with the requirements of Part IX of the Old O.S.A. is enforced by the last section in the Part, section 99. This section provides that it is an offence to fail to comply with Part IX. In particular, subsection 99(1) specifies that it is an offence:

(i) if the offeror fails to pay an increase in the consideration offered to all offeree shareholders whose shares are taken up, or fails to make adequate arrangements to have sufficient funds available to pay the cash consideration offered;

(ii) if the offeror makes a take-over bid without a take-over bid circular; or

(iii) if the offeror mails a take-over bid circular that does not contain all the prescribed information or consents, contains false or misleading information

or omits to state material information in a false or misleading way.

The maximum penalty on conviction for such an offence is a fine of $25,000.00 and one year in jail. Everyone who authorizes or acquiesces in the offence is also guilty of an offence but subject to a lesser penalty. Subsection 99(4) provides that it is a defence to the misrepresentation offence if the truth was not known to the person or company charged and could not have been known by the exercise of due diligence.

Subsections 99(2) and (3) provide for similar offences with respect to directors' circulars for each director of the offeree company who permits or acquiesces in the offence. The maximum penalty for such directors, however, is a $2,000.00 fine.

As was noted above, in the discussion of whether circulars should be subject to review by the Commission, the enforcement provisions can be criticized on two bases. First, because there is no prior approval of take-over bid and directors' circulars by the Commission the failure to comply with the statutory requirements may never be discovered. Second, the legislation provides no statutory remedy for the offeree shareholders it is supposed to

protect. The offeree shareholder may well have remedies at common law,[78] most importantly under the rule in <u>Hedley Bryne & Co. Ltd. v. Heller & Parteners Ltd.</u>,[79] but a common law remedy is less certain than a statutory remedy. Further, there does not appear to be any policy reason why offeree shareholders were not afforded statutory remedies of recission or damages similar to those applicable to prospectuses or the right to injunctive relief. Indeed, the policy of not subjecting circulars to prior review by the Commission would seem to mandate the opposite.

Another criticism of the enforcement provisions that may be made is that neither the Commission nor the courts are granted any statutory authority to order the divestment of shares acquired in contravention of the take-over bid provisions. Such a provision would act as a strong deterrent, because though an offeror might be willing to risk a fine and an action for damages to acquire and keep control of a company, he would be far less willing to assume that risk if he could be divested of control. The practical problems of administering such a provision, however, appear to dictate against its enactment.

CHAPTER III

THE 1971 AMENDMENTS AND THE FEDERAL LEGISLATION

The next major development in the securities regulation of take-over bids in Canada was the Merger Report in 1970.[80] This Report followed closely on the heels of a similar American report, the Wheat Report.[81] As the full title of the Merger Reports suggests - Report of the Committee of the Ontario Securities Commission on the Problems of Disclosure Raised for Investors by Business Combinations and Private Placements - it was not solely concerned with take-over bids. For instance, the core of the new Ontario and Alberta securities acts,[82] the closed system of prospectus exemptions, is a direct result of the Merger Report's concern with the problem of secondary distributions. The Merger Report was prompted in part by a tremendous increase in business acquisitions and take-overs during the late 1960's,[83] however, and it made extensive recommendations to change the existing take-over bid legislation, Part IX of the Old O.S.A. These recommendations resulted in changes to the take-over bid legislation in Ontario in 1971 and the other uniform act provinces shortly thereafter.[84] In this chapter we will examine the Merger Report's recommendations, insofar as they pertain to take-over bids, and the 1971 amendments to Part IX and

related provisions of the Old O.S.A. Then we will take a brief look at the federal legislation and some inter-jurisdictional problems.

A. Recommendations of the Merger Report

The Merger Report made 15 specific recommendations to modify the take-over bid provisions of the Old O.S.A.[85] The Merger Report considered and rejected the notion of abolishing exempt offers. The Committee felt that to do so would be too much of a disincentive for entrepreneurship. They did have several recommendations with respect to the exemptions, however.

1. The Merger Committee recommended that the private agreement exemption from the take-over bid provisions, subsection 80(b)(i), be restricted to 15 shareholders because they felt that at some point the number of private agreements suggest an offer made to shareholders generally and this numerical restriction would add certainty. They did consider whether this exemption resulted in the fair treatment of minority shareholders and this will be dealt with in Chapter V.

2. In line with their recommendations in 1., the Merger Committee recommended that the second part of the exemption in subsection 80(b)(iii), for offers to shareholders

of public companies with less than 15 shareholders, be deleted as redundant.

3. The Merger Committee looked at the market purchase exemption in subsection 80(b)(ii) closely. They considered the City Code requirement that offers should first be placed before the directors of the offeree company and the S.E.C. requirement, then new, that barred take-overs through the market without disclosure.[86] They recommended that anyone who had acquired 20 percent of the equity shares of a company pursuant to the market purchase exemption should be required to report that fact within three days. The acquisition was to be timed from the date of the trade so as to eliminate any delay. Further, the offeror was to report each additional five percent of the offeree company that it acquired within three days. Such reporting requirements would be markedly different than that required of an insider who only had to report his trading within ten days of the end of the month in which the trade took place.[87] The writer surmises that the reporting requirement was directed at creeping take-over bids, providing information and hence protection to the offeree shareholders. The Merger Committee decided that to regulate the intention to make a bid would be impossible and they chose instead only to regulate by requiring reporting of holdings which were certain and objectively discernable.

This decision, however, allowed an offeror to acquire up to 19 percent of an offeree company and to keep that fact secret for up to 40 days.

4. The Merger Committee recommended, again in relation to the market purchase exemption, that an offeror be prohibited from reducing any pro-rata purchases he might be required to make pursuant to subsection 81.7. by purchasing securities in the market during the take-over bid. The practical effect is that in a partial bid the offeror could not reduce the minimum number of shares he would purchase under the offer by purchasing on the market at a lower price.

5. In a closely related recommendation, the Merger Committee recommended that the offeror not be permitted to make market purchases during its take-over bid unless the offeror's intention to do so was disclosed in the take-over bid circular. The Merger Committee considered the S.E.C. regulation, then new, which prohibited market purchases while the offeror's take-over bid was outstanding. They also considered the situation in Britain where market purchases were permitted, if disclosed each day, only where the take-over bid was for all outstanding shares.[88] The Committee felt their proposals, providing for disclosure in the take-over bid circular and once 20 percent was reached, and prohibiting the reduction of the minimum number of shares

to be taken up in partial bids, would provide flexibility to the offeror and adequate protection to the offeree shareholders. The Merger Report pointed out, for instance, that in a partial bid an offeree shareholder might choose to sell all of his shares at the market price rather than tendering under the higher price in the offer where only a portion of his shares might be taken up.

6. The Merger Report contained one final proposal with respect to exempt offers. It recommended that the exemption in subsection 80(b)(iv) on application to the court should instead be available on application to the Commission. The Committee wanted to give the Commission this discretion so as to be consistent with the discretion granted to the Commission under section 59 of the Old O.S.A. and several other sections.

The Merger Committee's other recommendations were concerned with remedies for inadequate or misleading disclosure in take-over bid circulars, certain additional information that they felt should be in take-over bid or directors' circulars and terms in regard to timing and taking up shares that they considered should be mandatory.

7. The Merger Report reviewed the Kimber Committee's policy decision not to have take-over bid circulars reviewed

by the Commission prior to distribution to the offeree shareholders whether or not the transaction involved issuing securities. The Merger Committee concluded that take-over bid circulars had usually been responsibly and accurately prepared, but to ensure compliance with the statutory requirements they felt that the take-over bid circular should be treated exactly as a prospectus except insofar as a prospectus required pre-clearance by the Commission. The Merger Committee recommended that the take-over bid circular be approved by the directors, signed and certified in the same manner as a prospectus[89] and accompanied by a certified copy of the resolution of the board of the offeror approving its filing and distribution.

The reader will recall that one of the criticisms of the original take-over bid provisions in the Old O.S.A. concerning take-over bid circulars was that while it was an offence to breach the statutory requirements concerning the circular, the statute did not impose any civil liability on the offeror nor did it grant the offeree shareholders a right to recision or withdrawal for breach of the statutory requirements. The Merger Committee recommended that the offeree shareholder have a right to recision if the take-over bid circular made either an untrue statement of a material fact or omitted to state a material fact in a misleading way.[90] Further, the Merger Committee recommended that the directors of the offeror be liable for any material false

statement contained in a take-over bid circular coupled with the same defenses available were the take-over bid circular a prospectus.[91]

8. The Merger Committee recommended that if the minority shareholders could apply to the courts for orders requiring their shares to be purchased[92] or where the majority shareholder could compulsorily acquire the minority shareholders shares, that these rights be clearly set out in the take-over bid circular and that the offeror should advise the offeree if he intends to exercise the right to acquire compulsorily the minority shares.[93] Sophisticated shareholders would probably not benefit from such information, but it might be of some value to unsophisticated shareholders and it is in keeping with the philosophy of the take-over bid provisions to protect shareholders through disclosure.

The Merger Report considered and rejected requiring the offeror to disclose his purpose or business intention in attempting the take-over. The Committee felt that the benefit to offeree shareholders would be questionable and, based on their analysis of the American experience, that the disclosure might be misleading because the results of take-overs were rarely those intended.

9. The Merger Committee considered whether the

identity of the offeror in a cash take-over bid should be disclosed. They came up with the compromise recommendation that where the bid was for all the outstanding shares there should be no change, but that if the bid was for less than all the outstanding shares the identity of the offeror should be disclosed. They felt the offeree shareholders were entitled to know the identity of the offeror with whom they would be associated with as shareholders if they tendered and not all their shares were taken up. The same reasoning would apply to an offeree shareholder who did not tender in a bid for all outstanding shares, but the Merger Committee ignored this.

10. The Merger Committee considered and rejected making directors' circulars mandatory. They also considered the closely related matter of what comments short of a directors' circular recommending acceptance or rejection of an offer were proper. They recommended that a senior officer of the offeree company should be permitted to communicate with the offeree shareholders indicating that the offer is under study by the board of directors of the offeree company, that a directors' circular would be forthcoming and suggesting the offeree shareholders defer depositing their shares until the directors' circular arrived.

11. Submissions were made to the Merger Committee that

directors' circulars should set out a breakdown as to how each director voted in deciding whether to recommend acceptance or rejection of the bid and what each director's particular interests were. The Committee did not adopt this approach, but they felt that any of the directors should be free to recommend the acceptance or rejection of an offer even if the board itself was unwilling to act. They recommended that any director of the offeree company who wanted to make an independent recommendation should do so in the form of a circular setting out his reasons for doing so, his trading in the offeree company's securities, the details of any private agreement for the sale of such shares and any understanding as to his future employment and perquisites should the take-over succeed.

12. The Merger Committee acknowledged that a take-over bid is frequently amended in the face of a competing offer. Because such a change in the offer is wholly in control of the offeror and even though all offeree shareholders depositing will get any increase in consideration that is offered, the Committee felt the change in the offer was a sufficient change in circumstances that the offeree shareholders should be protected by having a right to withdraw deposited shares. The Committee recommended that any change in the terms of an offer, except the extension of time for acceptance, should give the offeree shareholders a

further seven days from the date of the change to withdraw their shares. The recommendation can probably be justified on basic contract principles in that any material change in an offer constitutes a new offer. Consequently, a tendering under the old offer, where the purchase was not yet concluded, did not effect a binding contract. As a practical matter the recommendation seems to be directed at getting the best possible deal for the offeree shareholder by making competitive bidding for his shares possible. Otherwise a competitive bidder might never enter the fray, knowing that the number of shares already deposited under the other bid makes the possibility of the success of his bid remote if not impossible.

13. The original take-over bid provisions were criticized because an offer for all the shares of a certain class was not governed by the timing requirements applicable to a partial bid even though there may have been several classes of equity shares in the offeree company. The Merger Committee recommended, therefore, that an offer for less than all the voting shares of all classes should be subject to the special timing rules applicable to partial bids. They specifically rejected the idea that the offer should be made pro-rata across classes of equity shares as being too restrictive on the offeror.

14. The Merger Committee was concerned that the failure to impose any restriction on when the offeror must take up and pay for shares tendered under bids for all the shares was, when coupled with the right of withdrawal for only the first seven days, a potential area of abuse. Offerors could keep offeree shareholders locked in indefinitely with only a conditional commitment on their part. The Committee considered recommending that the offeree shareholder be free to withdraw his shares if they had not been taken up and paid for within 35 days. They opted instead for a recommendation that at the end of 35 days the offeror be forced to either abandon his offer or purchase all the shares tendered to date. The practical effect is that even if an offer is conditional on acquiring 90 percent, the offeror is going to have to weigh his chances at the end of 35 days. If the offeror goes ahead and takes up the tendered shares it takes the risk that it may make an enormous expenditure but not achieve the desired degree of control. While this provides excellent protection for offeree shareholders, it may discourage certain take-over bids. The Merger Report did not appear to consider this and simply stated:[94]

> "When the offer for all has some condition attached, on all the shares being tendered there appears to be no reason for permitting the offeror's obligation to take up and pay for the shares to extend for any longer period than that permitted for a partial offer."

15. The final recommendation of the Merger Report on take-over bids concerns the conditions that could be attached to such bids. The Merger Committee was primarily concerned with the inclusion of what are known as "market out" clauses in take-over bid offers. Such clauses are included in underwriting agreements. They allowed the offeror to back out of the commitment to take up and pay for tendered shares if, just before the offeror was supposed to do so under the terms of the offer, it was no longer a good business risk in the offeror's subjective opinion. The Merger Committee recommended that such escape clauses be prohibited on the grounds that the offeree shareholder is committed once his shares are tendered and the period of withdrawal has run and the offeror ought to be similarly committed, subject to his share objective being achieved. Prohibiting all conditions but the achievement of a certain share objective would give offeree shareholders more protection than vendors in private agreements, where the sale might be subject, for instance, to the confirmation of the value of inventory and accounts receivable by an independent auditor.

B. Amendments Resulting from the Merger Report

As noted earlier, the take-over bid provisions in the Old O.S.A., and the securities legislation in the other uniform act provinces, were amended shortly after the release

of the Merger Report almost exactly as recommended in the Report. The changes were incorporated on a piecemeal basis rather than rewriting the provisions entirely, but they respresented a trend toward increasing regulation of take-over bids. We will examine the changes to the Old O.S.A., the changes made in Alberta and the other uniform act provinces being virtually identical.[95]

1. Exempt Offer

The definition of "exempt offer" in subsection 81(b) was changed as recommended by the Merger Report.

(a) The private agreement exemption was restricted to a private agreement with less than 15 shareholders.

(b) The market purchase exemption was restricted by the requirement that purchases under the exemption were to be reported in accordance with an addition to the insider trading provisions, section 110a, which provided as recommended that:

(i) where an offeror acquires more than 20 percent of the voting rights attached to outstanding equity shares, through the facilities of a stock exchange or in the over-the-counter market, it shall make a

special insider trading report of this fact within three days; and

(ii) the offeror shall file additional reports with the Commission with the acquisition through a stock exchange or in the over-the-counter market of each additional 5 percent.

A further related addition was made to the insider trading provisions, subsection 109(2)(c), to ensure that the three day reporting requirement in section 110a was not stretched into eight days. This was accomplished by providing in the subsection that ownership shall be deemed to pass, for the limited purpose of the reporting requirement, at such time as an offer to sell is accepted by the purchaser or his agent or an offer to buy is accepted by the vendor or his agent.

(c) The private company exemption was amended by deleting any reference to public companies.

(d) The court order exemption was changed to provide that the Commission could order an exemption.

2. <u>Terms Applicable to all Offers</u>

(a) Subsection 82.3. of the Old O.S.A. was amended by

providing that where the terms of a take-over bid are varied before the expiration thereof that offeree shareholders have an additional seven days from the receipt of the varied offer within which to withdraw shares deposited pursuant to the bid.

(b) Subsections 82.4., 5., 6. and 7. of the Old O.S.A. were amended to provide that the special partial bid rules applied whenever the offer was for less than all the equity shares of the offeree company, rather than all the equity shares of a class. The partial bid rules are:

(i) that tendered shares not be taken up and paid for until a minimum of 21 days had expired;

(ii) that the maximum time within which shares may be deposited shall not exceed 35 days;

(iii) that, provided conditions are met or waived, deposited shares shall be taken up and paid for within 14 days of the last day within which shares could be deposited; and

(iv) that if more shares are tendered than the offeror is bound or willing to take up, that they shall be taken up pro-rata.

(c) Several additional subsections were added to section 82, 8., 9., 10. and 11.:

(i) subsection 8. provides that if the laws applicable to the offeree company provide for a right of appraisal or acquisition that the offeree shareholders be advised of their rights of appraisal and whether the offeror intends exercising any right of acquisition it might have;

(ii) subsection 9. provides that if the offeror intends to purchase shares in the market during the bid his intention shall be set out in the take-over bid circular and prohibits the offeror from reducing the number of shares he is bound to take up under the terms of a partial offer by such purchases;

(iii) subsection 10. provides that only two conditions are permissible in take-over bid offers. First, the right to withdraw the offer if the required number of shares are not tendered and, second, the right to withdraw where the action of the board of directors of the offeree company subsequent to the date of the offer materially changes the undertakings, assets or capital of the offeree company; and

(iv) subsection 11. provides that in an offer for all the equity shares of the offeree company the offer shall take up and pay for all shares tendered at the end of 35 days or abandon the offer.

3. <u>Take-Over Bid and Directors' Circulars</u>

(a) Section 87 of the Old O.S.A. was amended to explicitly allow the board of directors of the offeree company, if they were considering sending a directors' circular, to advise the offeree shareholders both of this fact and not to tender their shares until they heard further from the directors. The section then provides that if such advice was given to the offeree shareholders the directors must send a directors' circular at least seven days prior to the expiry of the offer. Section 88 was further amended, as recommended in the Merger Report, to provide that an individual director or officer of the offeree company could recommend to offeree shareholders that they accept or reject the bid. If the director or officer chose to do so he must send a circular to each offeree shareholder containing the information relating to his holdings and interests that would be required of the directors were a directors' circular sent.

(b) The provisions relating to approval of a take-over bid circular by the directors of the offeror and to approval

of a directors' circular by the directors of the offeree company - section 89 of the Old O.S.A. - and requiring the inclusion of a statement to that effect in the take-over bid or directors' circular - section 93 and section 99, respectively - were amended as follows:

(i) By the addition of section 89a which provides that a take-over bid circular shall contain a certificate, signed on behalf of the board of directors of the offeror, that the circular constitutes a full, true and plain disclosure of all material facts as required by Part IX of the Old O.S.A.

(ii) By amending section 99 to provide for the inclusion of a similar certificate in a directors' circular or in a circular sent by an individual director or officer under the new section 87 referred to in 3(a) above.

(c) One further minor change that was made in the required contents of a take-over bid circular in accordance with the Merger Report's recommendations was to amend section 92 of the Old O.S.A. to require the disclosure of the offeror's identity in bids for less than all the outstanding shares of the offeree company.

4. <u>Right of Recision</u>

One of the most significant recommendations in the Merger Report in regard to take-over bids was that offeree shareholders should have a right of recision and that the directors of the offeror should be civily liable for a misrepresentation in a take-over bid circular. A new section 100a was added to Part IX as a result of this recommendation. The section provides:

(a) That an offeree shareholder who sells his shares pursuant to a take-over bid has a right to rescind the sale if the take-over bid circular contains an untrue statement of a material fact or omits to state a material fact in a misleading way;

(b) A limitation period of 90 days from the date of the sale or receipt of the circular, whichever is later;

(c) Defenses to the right of recision, namely:

(i) if the untruth was unknown or in the exercise of reasonable diligence could not have been known to the offeror; or

(ii) if the offeree shareholder knew of the untruth at the time he tendered his securities.

(d) The right of recision is in addition to and without derogation from any other right the offeree shareholder may have at law; and

(e) Every take-over bid circular shall contain the statement of the right of recision provided by this section.

Further, section 141c was added to provide for civil liability of directors in exactly similar terms to that imposed on directors of an issuer for misleading statements in a prospectus.[96] The section provides that every person or company to whom a take-over bid or directors' circular was sent shall be deemed to have relied upon the statements made in the circular and, if a material false statement is contained in a circular, all directors of the company authorizing the circular at the time it was signed shall be liable to pay compensation to all offeree shareholders who suffer any loss as a result of the material false statement.

C. The Federal Legislation and Inter-Jurisdictional Conflict

Before proceeding on to Chapter IV and a description and analysis of the changes made in the take-over bid legislation by the new generation of securities legislation which became effective in Ontario and Alberta in 1979 and 1982, respectively, it is important to describe developments on the federal level.

As noted in Chapter II, the take-over bid legislation in Part IX of the Old O.S.A. was a model for amendments to the Canada Corporations Act in 1971[97] as a result of the Dickerson Report recommendation concerning take-over bids.[98] The introduction of take-over bid provisions in 1971 was done quickly as a stop gap measure, for it was not until December 15, 1975 that the Canada Business Corporations Act[99] was proclaimed in force. The 1971 amendments concerning take-over bids were brought forward with minor changes in sections 187 through 198 of the C.B.C.A.

The federal provisions are very similar to the Ontario legislation by design. The Dickerson Report decided to resist the temptation to make major modifications in the Ontario law for the sake of uniformity.[100] This was before the 1971 amendments to Part IX of the Old O.S.A. and they indicated that otherwise they would have adopted most of the recommendations made by the Merger Report.

There are three differences worth noting between the federal legislation and the uniform act provisions. First, the threshold level of ownership that triggers the application of the legislation was reduced from 20 percent to ten percent.[101] The Dickerson Report thought this was a reasonable compromise between the 20 percent threshold level

under Ontario law and the much more stringent American legislation at this time which required take-over bid circular type disclosure and special insider reports whenever five percent of an offeree company was acquired.[102]

Second, the federal legislation allows an interested person to seek a restraining order to block a bid where a take-over bid circular or a directors' circular is misleading.[103] Interested person is defined to include an offeree shareholder, the offeree company, the offeror and a rival offeror.[104] The Dickerson Report felt that this was a more effective remedy than a large penalty, because it would be available to block a bid even where there were no grounds to justify an injunction order at common law.[105]

Third, the definition of "take-over bid" in section 187 of the C.B.C.A., though not the definition in the C.C.A., was designed to cover an offer by an issuer to repurchase its own shares. Consequently, all the rules on timing, disclosure and mandatory terms applicable to take-over bids are applicable to issuer bids under the federal legislation.

Much more significant than the actual differences in the federal and provincial legislation, however, is what

it portends in two important areas: the overlap between corporate law and securities law; and the possibility of conflict between the federal legislation and provincial legislation.

There is of course no federal securities law per se, though there have been proposals to merge the provincial securities commissions into some type of national agency.[106] The C.B.C.A., and provincial corporate statutes, contain numerous provisions concerning prospectuses, insider trading, disclosure and take-over bids, however, which one might expect to find in securities legislation. One major difference would appear to be that the corporate statutes use as their jurisdictional nexus the statute under which the company is incorporated, while securities acts generally rely for a jurisdictional nexus on the geographical area in which the regulated activity is occurring.[107] This means that in the securities regulation of take-over bids the address of the shareholders to be protected is what counts.[108]

Johnston[109] cites as an example a take-over bid made for a federally incorporated company with its principle place of business and most of its shareholders in New Brunswick and a much smaller number in Ontario. The offeror will have to comply with the C.B.C.A. for any take-over bid

as defined in that act, and additionally with the Ontario securities legislation if the offer is extended to Ontario shareholders (which is required under the C.B.C.A.) and if the 20 percent threshold test is met. If the same company were incorporated in New Brunswick only the Ontario legislation would have to be complied with.

It is interesting to note in this regard that while the definition of take-over bid is defined with a geographical limitation,[110] the private agreement exemption has no such limitation.[111] Consequently, it might be argued that so long as private agreements are made with only 14 shareholders in each of Ontario and the uniform act provinces the take-over bid is exempt. This argument is based on the "reasonably clear authority"[112] of Hretckha v. A.G. of British Columbia where Justice Martland stated:[113]

> "The order is not before us, but in any event, like any other order of the Commission it would have application only in the Province of British Columbia."

The more practical view, however, is that although the persons to be protected are definitely limited to those with Ontario addresses, the criteria for deciding whether the exemption is met or exhausted are not so restricted.[114]

On the issue of whether provincial securities legislation applies to federally incorporated companies,

Lymburn v. Mayland[115] is authority for the proposition that federally incorporated companies are bound. In that case the issue was whether The Alberta Security Frauds Prevention Act, 1930[116] was ultra vires in purporting to regulate certain federally incorporated companies. The Privy Council found that the legislation was not ultra vires insofar as federally incorporated companies were concerned because it did not preclude them from selling their shares unless they were registered - they could sell through registered brokers - but merely subjected them to competent provisions applying to all persons trading in securities and was thus within the provincial power to legislate with respect to "property and civil rights".

An important issue that has not yet been finally resolved is whether the provisions in the federal corporate statute are paramount to identical provisions in the various provincial securities statutes. This is the issue in the case of Multiple Access Ltd. v. McCutcheon[117].

The case arose from a take-over situation. The defendant McCutcheon was president of Multiple Access Ltd., a company incorporated under the Canada Corporations Act. McCutcheon bought large quantities of shares in Multiple Access on March 10, 1972 for under $2.00 a share. McCutcheon disclosed his purchases as he was required to do under the

insider reporting provisions in both the Canada Corporations Act and the Old O.S.A. Simultaneously, Multiple Access announced its offer to buy the assets of Canadian Marconi Limited and the offer was accepted on March 21, 1972. The value of Multiple Access shares rose to $7.00 by mid May 1972 and $10.00 by November 1972. Efforts were made by certain shareholders to have Multiple Access bring an action against McCutcheon under section 113 of the Old O.S.A. to recover the "direct benefit or advantage" gained by McCutcheon in his use of the "specific confidential information" - the knowledge that the offer to Canadian Marconi was going to be made. Multiple Access failed to commence the action and the aggrieved shareholders obtained a court order under section 114 of the Old O.S.A. requiring the Ontario Securities Commission to commence an action on behalf of Multiple Access against McCutcheon. McCutcheon raised the constitutional issue in his defence, claiming that section 100.5 of the Canada Corporations Act did not provide any authority for the Commission to commence the action.

Sections 100.4 and 100.5 of the Canada Corporations Act are virtually identical to sections 113 and 114 of the Old O.S.A. except that section 100.5 authorizes the court to appoint the Director of the Corporations Branch to commence or continue the action, not a provincial securities commission. The Ontario High Court found that both statutes

were intra vires their respective legislatures and that the provincial legislation was not rendered inoperative under the paramountcy doctrine because the provisions were not repugnant in the sense of incompatibility or inability to stand together. The issue had not been raised before and the court stated:[118]

> "It may be noted that the combined effect of the federal and provincial companies legislation is to create a large number of systems of corporate law and a corresponding proliferation of administration which operate concurrently with resulting detriment to legislative and administrative economy, but I am not aware that this has given rise to judicial questions as to its acceptability under the scheme of the British North America Act, 1867."

The Ontario Business Corporations Act[119] contained similar insider liability provisions as well, but they only applied to companies incorporated under that legislation, and the Old O.S.A. specifically excepted such companies from certain aspects of its operation such as the insider trading provisions.[120] The insider trading provisions have now been removed from the Ontario Business Corporations Act[121] and only apply under the Alberta Business Corporations Act to "non-distributing companies",[122] which companies are not covered by the New A.S.A.[123]

McCutcheon appealed the decision upholding the Ontario legislation to the Ontario Divisional Court which found that the provisions of the Canada Corporations Act and the Old O.S.A. could not live together because both looked to the same direct benefit or advantage, and would permit it to be recovered twice. The court keyed in on the fact that there were no supplemental provisions which, for example, exempted the operation of one statute if the other were invoked. Multiple Access appealed to the Ontario Court of Appeal, which dismissed the appeal, and then to the Supreme Court of Canada which has not yet rendered a decision. If the Supreme Court were to uphold the Divisional Court's ruling the practical effect might be to emasculate the power of provincial securities commissions to enforce provisions similar or identical to those found in the C.B.C.A. Since the take-over bid provisions in the C.B.C.A., sections 187 through 198, are very similar to those found in the provincial legislation, this could have important consequences for the securities regulation of take-over bids for federally incorporated companies.

An interesting development in the same area concerns the unsuccessful take-over bid by Campeau Corporation for Royal Trustco in 1980. The Ontario Securities Commission conducted a hearing to determine whether the directors of Royal Trustco had adhered to the requirements of the New O.S.A. in defending Royal Trustco

from the bid. The Ontario Securities Commission found some evidence of impropriety[124] in the behaviour of two directors, Royal Trustco chairman Kenneth White and president John Scholes, and suspended their trading privileges for a brief period by way of a sanction.[125] This suspension is under appeal.

The federal authorities also entered the controversy, however, by taking two steps under the C.B.C.A. First, the Director of the Corporations Branch issued an investigation order of Royal Trustco under Part XVIII of the C.B.C.A. This order was quashed by the Ontario Supreme Court and the Director is appealing this ruling.[126] Second, the Director of the Corporations Branch has applied to the Supreme Court of Ontario to commence a derivative action under Part XIX of the C.B.C.A. on behalf of Royal Trustco on the grounds that the failure of the Royal Trustco directors to fully disclose their plans was unfairly prejudicial to the small Royal Trustco shareholders.[127]

A development such as this highlights the overlap between the C.B.C.A. and provincial securities regulation and in the controversial area of contested take-over bids it is bound to be a continuing trend. It is interesting to speculate as to what might happen if both the Director of the Corporations Branch and the Ontario Securities Commission

took steps simultaneously to enforce their virtually identical take-over legislation. It is possible that some aspects of the provincial legislation might be found not to apply to federally incorporated companies.

CHAPTER IV

THE TAKE-OVER BID PROVISIONS OF THE NEW SECURITIES ACTS

Take-overs of public companies continued to be popular throughout the 1970's and the pace increased toward the end of the decade.[128] The take-over bid technique was used frequently in these take-overs and the securities regulation of take-over bids became more significant with the increase in the size and value of the offeree companies and the sophistication and competitiveness of the offerors. It seems an axiom of securities law that whenever there are perceived abuses of the rights of shareholders, particularly small shareholders, either through the use of loopholes in the regulatory scheme or because certain activities are not regulated, the law is changed to correct the perceived deficiency. This is certainly true insofar as take-over bids are concerned. The experience of securities commissions in the 1970's, mostly that of the O.S.C., gave rise to changes in the regulation of take-over bids. These changes were made at first by changes in the Commission's policy in administering the Old O.S.A. and enforced by the discretionary power of the Commission to impose cease trading orders and deny statutory exemptions. Eventually there were changes in the actual legislative provisions with the enactment of the New O.S.A. which was proclaimed in force, insofar as we are concerned,[129] on September 15, 1979. Alberta is the only

other province to have enacted and proclaimed a new securities act, the New A.S.A., which was proclaimed in force on February 1, 1982. The Alberta legislation is modelled closely on the Ontario legislation, particularly the new closed system of prospectus exemptions, but there are some significant differences in the take-over bid provisions in the two pieces of legislation.

This chapter covers the most recent law reform report to deal extensively with the take-over bid provisions, the 1973 Hodgson Report.[130] It then examines the differences between the Old O.S.A., as amended in 1971, with the New O.S.A., identifying significant developments for further analysis in Chapter V. Finally the take-over bid provisions in the New A.S.A. are compared and contrasted with those in the New O.S.A.

A. The Hodgson Report

The Select Committee on Company Law that wrote the Hodgson Report felt that no study of mergers and amalgamations of companies would be complete without reviewing the securities legislation governing take-over bids and they wrote several chapters on the subject.

They analyzed the effect of the exemption from the take-over bid provisions provided for agreements with less than 15 shareholders and disagreed amongst themselves whether it should be allowed to continue.[131] This will be discussed in the next chapter.

The Select Committee reviewed the implications of partial bids and the special rules governing them.[132] They examined the British position under the City Code which states partial bids are undesirable and only permitted if the approval of the Take-overs Panel is obtained in advance.[133] The British position appears to be based on the feeling that it is unfair to the offeree shareholders to permit an offeror to acquire effective control over the entire business and assets of the offeree company without purchasing all the shares in the offeree company, or at least offering to do so. The Select Committee noted that there was no prohibition against partial bids in the United States. They did not recommend against partial bids because they felt shareholders were adequately protected by the rule requiring that take-over bids be made to all shareholders. Each shareholder then has the option of accepting or rejecting the bid as he sees fit and any premium for control is available to all shareholders.

The Select Committee did recommend one change in the special rules governing partial bids. They noted that while subsection 82.9. of the Old O.S.A. prohibited the offeror from reducing the number of tendered shares it is bound to take up on a pro-rata basis by making purchases in the stock market during the take-over bid, there was no requirement that such purchases were to be counted in determining whether the share objective specified in the take-over bid offer had been achieved. They recommended that the legislation be amended to rectify this situation.

The Select Committee considered the necessity for and contents of directors' circulars.[134] It was their feeling that the offeree shareholders were entitled to as much information as they could get to form a reasoned judgment regarding acceptance or rejection of a bid, especially the information: whether each director or senior officer has accepted or intends to accept the offer on his own behalf; and whether there has been a change in the financial position or prospects of the offeree company since the date of its last published financial statement. Under the Old O.S.A. the shareholders would never get this information unless the directors of the offeree company decided to make a formal recommendation to accept or reject the bid. The Select Committee could see no reason why the receipt of this information should be dependent on such a

decision by the directors. They recommended that directors' circulars be mandatory in all cases, but that it remain optional on the part of the directors whether or not to make a recommendation to accept or reject the offer.

Further, the Select Committee recommended fine tuning of subsection 96.2. of the Old O.S.A., which only required disclosure of whether each insider intended to accept the offer in respect of any shares, so that the directors' circular would require disclosure of the number of shares held by each insider in which acceptance is intended. They felt that there was less chance of misleading the offeree shareholders if this type of disclosure was required.

The Select Committee also reviewed the issue of conditions permissable in a take-over bid.[135] They felt that the recommendation in the Merger Report, and the changes in the Old O.S.A. as a result, subsection 82.10., had gone too far. The Merger Report stated that the offeree shareholder was committed to sell his shares once they were tendered and that the offeror ought to be similarily committed, subject to its share objective being achieved.[136] The Select Committee noted that prior to the enactment of subsection 82.10. take-over bids were normally subject to many commercially reasonable conditions, quite

apart from a minimum share objective or a very subjective "market-out" clause, such as:

(i) that no changes will take place in the authorized or issued capital of the offeree company during the bid, except by way of converting existing rights or exercising options;

(ii) that there have not been any material adverse changes in the financial position of the offeree company since its last published financial statement;

(iii) that there has been no material change in the assets of the offeree company; and

(iv) approval of the appropriate regulatory authority, if required.

The Select Committee felt that such conditions were reasonable because the offeror was not simply making a portfolio investment, but buying effective control of a going concern and vitally interested in the earnings, financial position, assets and business of the offeree company. Under subsection 82.10., however, a substantial asset of the offeree company could be lost or destroyed and the offeror would still be committed.

The Select Committee recommended, therefore, that while purely subjective conditions - "in the opinion of offeror" - should still be prohibited, substantial changes in the position of the offeree company beyond the control of the offeror, and in some cases beyond the control of the offeree company, should give the offeror an opportunity to withdraw its bid. They felt this would provide a more equitable sharing of the risk of change between the offeror and offeree shareholders because the offeror is making a very substantial commitment in making the bid and if the bid is withdrawn the offeree shareholder has only lost the right to sell his shares from the date of deposit until they are returned.

The Select Committee was particularly concerned with activities of the directors of the offeree to defend against the bid.[137] They liked Rule 38 of the City Code[138] in Britain which prohibited the board of directors from taking certain actions during the course of a bid or while one was imminent without the approval of the shareholders of the offeree company. The actions covered by the Rule are such things as issuing or granting options in respect of authorized but unissued shares, the disposition or acquisition of material assets and entering into contracts otherwise than in the ordinary course of business.

The Select Committee did not suggest that the

provisions of Rule 38 be inserted into the Old O.S.A., only that appropriate legislation - presumably the corporate statute - contain such provisions. It is useful to digress here to consider the law in Canada on the authority of directors to make material changes without the approval of the shareholders as a defensive measure in a take-over battle.

The leading Canadian case is Teck Corporation et al v. Millar.[139] This case concerned an action by the plaintiff Teck Corporation to set aside an agreement between Afton Mines Ltd. and a subsidiary of Placer Development Ltd. for the potential development of Afton's major asset, a copper property near Kamloops, British Columbia. The agreement provided for the possibility of Placer Development eventually acquiring a 30 percent equity interest in Afton Mines. Teck Corporation had acquired majority voting control of Afton Mines just before the Afton-Placer agreement was entered into pursuant to a slow, creeping take-over but they did not yet control the board of directors of Afton Mines. Teck Corporation's majority control was subject to possible dilution as a result of the Afton-Placer agreement.

Teck Corporation's action was dismissed. The court held that the shareholders had no right to alter the terms of the directors' mandate to manage the company except by

amending the articles or removing the directors from office.[140] Further, the court held that the directors' use of their power to defeat those seeking a majority was not necessarily for an improper purpose so long as there were reasonable grounds for their belief, in light of the reputation, experience and policies of the principals in Teck Corporation, that there would be substantial damage to the company's interests.[141]

The suggestion of the Select Committee to require shareholder approval in such a situation would clearly require a change in the statutory standard imposed on directors, consistent with the common law, to act honestly, in good faith and in the best interests of the company.[142] Regardless of whether shareholder approval is required, the Select Committee recommended that if changes are made by the directors along the lines referred to in Rule 38 of the City Code, that the offeror should be entitled to terminate its bid.[143]

In addition, the Select Committee recommended that the offeror should be allowed to insert conditions so as to be able to withdraw its bid if there was substantial damage to or loss of a major asset, a substantial change in the financial affairs of the offeree company, or the offeror failed to obtain any required approval or permission from a regulatory body.[144]

The Select Committee had one further concern relating to take-over bids. They noted that Part X of the Old O.S.A. governing insider trading was not broad enough to cover the possible abuse of confidential inside information in the case of take-over bids and amalgamations.[145] Unless the offeror was already an insider of the offeree company before a take-over bid, insiders of the offeror were not insiders of the offeree company and could trade in the shares of the offeree company armed with knowledge of the terms of the impending take-over bid. Similarly, insiders of the offeree company might trade in shares of the offeror. In neither instance would these insiders have to file insider trading reports nor would any liability attach under the legislation. The Select Committee noted that the same situation could exist in an amalgamation so that an insider of one of the amalgamating companies could trade with impunity in the shares of another amalgamating company on the basis of his knowledge of the proposed amalgamation.

The Select Committee recommended, therefore, that the Old O.S.A. be amended by the insertion of provisions, similar to subsection 100.1(5) of the Canada Corporations Act, extending insider liability by deeming the insiders of each company to have been insiders of the other company for six months prior to one of the companies becoming an insider of the other.

B. Changes Effected by the New O.S.A.

The take-over bid provisions of the New O.S.A. are found in Part XIX (sections 88 to 100).[146] Part XIX follows the same basic format as Part IX of the Old O.S.A., providing protection for offeree shareholders by the imposition of time for acceptance rules, requiring the disclosure of information in circulars and making certain terms mandatory in all bids. Part XIX is a more sophisticated piece of legislation than Part IX of the Old O.S.A. It is also more restrictive and comprehensive than the old legislation, including within its ambit certain activities that were either specifically excluded or not covered by the old definitions.

1. Definition of Take-Over Bid and Issuer Bid

(a) Take-Over Bid

The first part of the definition, subsection 88(k)(i), is much the same as that in the Old O.S.A., but subsection 88(k)(ii) goes on to include the acceptance of an offer to sell voting securities and deems such acceptance to be an offer and the company accepting to be an offeror. It is not clear from subsection 88(k)(ii) if the vendor is deemed to be an offeree as defined in subsection 88(l)(f)

and, therefore, whether he must be resident of Ontario for the provision to apply. In any event, the practical effect is to allow the O.S.C. to claim jurisdiction over the sale of shares on the Alberta Stock Exchange by an Ontario resident.[147] Whether the provision is valid or desirable in this respect is open to question.

In another change the definition now refers to "20 percent of the outstanding voting securities" rather than "outstanding equity shares" under the old definition. This eliminates the possibility, in a company with two classes of voting shares, of buying voting control without making a "take-over bid". The definition is only concerned with voting securities, however, and it does not deal with the problem of rights, warrants or convertible securities. It is theoretically possible to acquire sufficient non-voting but convertible securities so as to acquire effective control without making a "take-over bid".

(b) Issuer Bid

This is the first appearance of this term in Ontario's securities statute, but issuer bids were regulated to some extent by the O.S.C., pursuant to Ontario Policy 3-37 and its predecessor, since 1976. Issuer bids are now regulated by Part XIX of the New O.S.A. An issuer bid has no threshold level. It is defined in subsection 88(1)(d) as:

(i) an offer made by an issuer to its Ontario security holders to purchase, redeem or otherwise acquire any or all of a class of securities of the issuer, except debt securities that are not convertible into equity securities; and

(ii) an acceptance by an issuer of an offer to sell securities of the issuer described in (i), and the issuer accepting shall be deemed to be an offeror.

The purpose of including issuer bids in Part XIX is to regulate them, generally, in the same manner as take-over bids. The primary reason for this was the Commission's concern with the fairness to minority shareholders of issuers inviting subscription for their shares and subsequently designing a transaction for the purpose of eliminating the minority shareholders when it was advantageous for the controlling shareholders to do so.[148] Specific differences between the regulation of take-over bids and issuer bids will be noted in the remainder of this Chapter.

2. Exempt Bids

Both the definition of take-over bid and of issuer bid include all such bids, but subsections 88(2) and (3), respectively, exempt certain take-over and issuer bids from the rules in Part XIX. Under the Old O.S.A. exempt offers

were specifically excluded from the definition of take-over bid. This difference is of no practical effect, but there are several substantial changes between the definition of exempt offer under the Old O.S.A. and the list of exempted take-over bids in the New O.S.A.

(a) Stock Market Purchase Exemption

Subsection 88(2)(a) eliminates the over-the-counter part of this exemption and restricts the stock exchange part to purchases made on an exchange recognized by the Commission, and then only if made according to the by-laws, regulations or policies of the stock exchange. The practical effect is to drastically restrict the extent and use of this exemption. Only the T.S.E. is recognized at present[149] and its by-laws[150] subject a take-over bid to a regime that has most of the disadvantages to the offeror of a take-over bid made by way of a circular and none of the advantages. For instance, the offer must be for cash and the only condition permitted is a maximum number of shares that will be taken up. The events leading up to this change, namely the use of the stock market purchase exemption as it was worded under the Old O.S.A., will be covered in Chapter V.

(b) Private Company Exemption

This exemption in subsection 88(2)(b) is virtually

identical to the exemption under the Old. O.S.A.

(c) Private Agreement Exemption

This exemption is very similar to that under the Old O.S.A. There are minor differences in that now it is explicit that the offeror can enter into more than one agreement in total with the fewer than 15 shareholders and there are rules, designed to prevent abuse of the numerical restriction, specifying that in most cases each beneficiary of a trust is counted as a shareholder and that the consolidation of shareholdings during the previous two years are to be ignored. What is much more significant than these minor changes, however, is that subsection 91(1) of the New O.S.A. imposes a follow-up offer obligation in certain instances where a premium is paid in a take-over bid exempted under this provision. This will be dealt with in Chapter V.

(d) De Minimus Exemption

Subsection 88(2)(d) introduces a new exemption which provides that an offeror may acquire up to five percent of the voting securities of the offeree company within any period of 12 consecutive months. An offeror would only have to rely on this exemption if it already owned at least 15 percent of the offeree company because otherwise the transaction would not fall within the definition of take-over

bid. The exemption is subject to two important restrictions. First, the securities acquired by the offeror, associates or affiliates under this exemption in any 12 month period together with purchases during the same 12 months under the exemption is subsection 88(2)(a) - the stock market purchase exemption - shall not exceed five percent of the outstanding voting securities of the offeree company at the beginning of the period. Second, if there is a published market (defined in subsection 88(1)(j)) for the voting securities the purchase cannot be effected above the market price at the date of purchase, plus reasonable brokerage fees or other commission. This means that the exemption is only available if no premium is paid.[151]

Though these two restrictions narrow the exemption considerably, it will still be useful to the offeror to avoid compliance with the take-over bid rules in certain circumstances without having to apply to the Commission for an exemption. Alboini lists three such circumstances:[152]

(i) purchases through a broker rather than by private agreements of not more than five percent;

(ii) to augment use of the private agreement exemption in light of the new restrictive counting rules; and

(iii) purchase of no more than five percent on an exchange not recognized by the Commission.

It should be noted that the requirement to report the acquisition of 20 percent of the voting securities of an offeree company, and each additional five percent, within three days of the acquisition will apply to all purchases effected in reliance on the exemptions in subsections 88(2) and (3) and not just to purchases under the stock market purchase exemption as was the case under the Old O.S.A.[153]

(e) Control Group Exemption

Subsection 88(2)(e) provides an exemption which permits members of a controlling group of shareholders to freely transfer their voting securities within the group without being subject to the take-over bid requirements. The exemption is necessary because the definition of a take-over bid would generally have the effect of aggregating the ownership and proposed ownership of securities held by the control group.[154] The private agreement exemption is also available, but the control group exemption allows a premium to be paid without triggering the follow-up offer obligation.

(f) Commission Ordered Exemption

Subsection 99(e) grants discretion to the

Commission on application to exempt any person or company from any of the requirements of Part XIX where in its opinion it would not be prejudicial to the public interest to do so. This discretion is broader than that under section 90 of the Old O.S.A. which only permitted the Commission to declare a take-over bid to be an exempt offer. It applies to any requirement of Part XIX.[155] An exemption under this section would probably be available where only a small percentage of the shareholders of the offeree company are in Ontario, and the offeror has complied with the take-over bid provisions in another jurisdiction.

(g) Exempt Issuer Bids

Subsection 88(3) exempts issuer bids from the requirement of Part XIX in certain circumstances. Two of these exemptions are identical to those provided for take-over bids, namely:

(i) if the issuer bid is made by a private company; and

(ii) if the issuer bid is made through the facilities of a stock exchange recognized by the Commission in accordance with the by-laws, regulations or policies of the stock exchange.

A third exemption, provided for in subsection 88(3)(d), is similar to the de minimus take-over bid exemption. The differences are that securities acquired by the issuer under any of the other issuer bid exemptions are not included in calculating the maximum of five percent of the securities of a class in any twelve month period, and the requirement of providing five days notice of the intention to use the exemption. The form of notice is set out in Form 35 to the regulations, which is a version of Appendix A from Ontario Policy 3-37.[156] The notice is a very abbreviated form of issuer bid circular and only has to be published in the appropriate financial press rather than being sent to each security holder.

The two other types of exempt issuer bids have no counterpart among the exempt take-over bids. They are unique to the situation where an issuer is purchasing its own securities.

The first, found in subsection 88(3)(a), provides an exemption for issuer bids common to certain types of corporate finance transactions. The exemption is available where securities are purchased, redeemed or otherwise acquired pursuant to the conditions attached to the securities which permit such purchases without the consent of the owner, or securities are acquired to meet sinking fund

requirements. In addition, the exemption permits an issuer to acquire securities from an employee of the issuer, presumably in connection with stock options or prior to termination of employment.[157] The exemption can be justified either on the grounds that the security holder knew the security would be purchased or the possibility that it might be, or because of the small percentage of securities involved balanced against the desire to facilitate legitimate business transactions.

The second exemption, found in subsection 88(3)(b), is to exempt issuer bids required by an instrument, such as the corporation's constating documents or a trust deed, or by statute. In the latter case the usual type of purchase[158] will be pursuant to the shareholders' right to be bought out under a provision like that in the C.B.C.A., section 184. The purchase has to be mandatory.

In addition to the exemptions under subsection 88(3), of course, the Commission may on application exempt an issuer bid from any of the requirements of Part XIX under subsection 99(e).

3. <u>Time for Acceptance Rules</u>

There are two basic changes in the time for

acceptance rules. First, the minimum period in which shares must not be taken up and paid for and the right of withdrawal has been extended from seven days under the Old O.S.A. to ten days by virtue of subsections 89(1)3. and 4. Second, where the take-over or issuer bid is subject to approval of a governmental or regulatory authority, which is now a permissable condition in a take-over bid,[159] the time within which the offeror is bound to take up and pay for shares may be extended from 35 days to 125 days, an additional 90 days.[160]

4. Disclosure of Information

The required contents of take-over bid, directors' and director's and officer's circulars are now set out in Forms 31, 32 and 33 to the Regulations, respectively, rather than in the body of the statute. Before examining changes in the contents of the circulars, there are several related changes in the legislation that should be noted.

First, the identity of the offeror must be disclosed in all take-over bids, not just in partial bids.[161] This reflects a decision that the importance of this information to the offeree shareholders outweighs any deterrent effect that the requirement to disclose this information might have on potential offerors.

Second, directors' circulars are now mandatory, and must be sent to the offeree shareholders within ten days of the date of the bid but the directors have a choice whether or not to include a recommendation to accept or reject the take-over bid.[162] This change reflects the recommendation in the Hodgson Report that the information in the directors' circular is too important to the offeree shareholders to have its circulation to them depend on whether the directors of their company see fit to make a recommendation.

Third, though it is no longer necessary to include a recommendation in a directors' circular, the directors can advise the offeree shareholder in a directors' circular that it is considering making a recommendation and to hold off tendering their securities until they hear further. If such advice is included in a directors' circular, the directors must communicate either the recommendation or the decision not to make one at least seven days prior to the expiry of the offer.[163]

(a) Take-Over Bid Circular

As noted earlier, the required contents of the take-over bid circular are set out in Form 31 to the Regulations. One notable change is item 12 which provides that where a valuation of the offeree company is provided, pursuant to a legal requirement or otherwise, that the

circular must contain a summary of the valuation and advise where the valuation can be inspected and that a copy is available on request. A valuation is only required if the take-over bid is part of a going private transaction.[164]

Another change is that in addition to the requirement to disclose material changes[165] in the affairs of the offeree company,[166] item 16 has been added requiring a description of any material facts[167] concerning the securities of the offeree company and any other matter not disclosed in the circular that has not been previously disclosed and is known to the offeror that would reasonably be expected to affect the decision of the offeree shareholders to accept or reject the offer.

There is still no requirement that the take-over bid circular be reviewed and approved by the Commission prior to circulation, but the level of disclosure required has been raised somewhat by the New O.S.A. and the civil sanctions expanded.[168]

(b) Directors' Circular

The required contents of a directors' circular are set out in Form 32 to the Regulations. There are several minor changes from the Old O.S.A. One change, recommended by

the Hodgson Report, is that in disclosing their intention to accept the offer the directors must state the number of securities in respect of which each director, senior officer or associate has accepted or intends to accept.[169]

Another change is that in addition to requiring disclosure of beneficial ownership by insiders of the offeree company in the shares of the offeree company, item 9 requires disclosure of trading in the shares of the offeree company, including the number of shares, price and date of each transaction, by the insiders of the offeree company. Disclosure is not required for any insiders that furnish a certificate stating that, while possessed of knowledge of the pending take-over bid and prior to public dissemination of information as to that bid, they did not: trade in the securities of the offeree company; communicate information as to the take-over bid except in the necessary course of business; or recommend purchase of securities of the offeree company to anyone.

Disclosure similar to that required by item 9 is required of insiders regardless by virtue of the insider trading provisions,[170] but the information is not immediately available to offeree shareholders, especially small unsophisticated shareholders, because it is buried in monthly insider trading reports. Item 9 puts this

information in the hands of offeree shareholders in a nice tidy format.

Use of inside knowledge of impending take-overs is one of the areas in which offeree shareholders are very vulnerable to abuse. While the disclosure required in take-over bid and directors' circulars provides information to offeree shareholder concerning trading in the shares of the offeree company, by both insiders of the offeror and insiders of the offeree company, it does not impose any liability on insiders for abusing inside information. A significant change in this area has been made as a result of a recommendation of the Hodgson Report. Under subsections 1(8) and 1(9) of the New O.S.A. insiders of an offeror are deemed to be insiders of an offeree company, and insiders of an offeree company are deemed to be insiders of an offeror, for the six months previous to the offeror becoming an insider of the offeree company. This imposes insider trading liability[171] on insiders of the offeror for trading in shares of the offeree company and vice versa.

Returning to the directors' circular, item 10 now requires the directors to correct and supply additional information in their knowledge to remedy any incorrectness or misleading information in the take-over bid circular. Further, item 12 requires the directors' circular to state

the particulars of any information not already disclosed which is known to the directors and would reasonably be expected to affect the decision of the offeree shareholder to accept or reject the offer.

One final change in requirements worthy of note is item 17 which specifies that the circular include a reference to the right of action for damages created by subsection 127(2) of the New O.S.A.

(c) <u>Director's and Issuer Bid Circulars</u>

(i) Form 33 sets out the required contents of a director's or officer's circular. The requirements are virtually identical to those of the directors' circular except, of course, that it only relates to the director's or officer's holdings, relationships and knowledge rather than that of all the directors and insiders.

(ii) The required contents of issuer bid circulars are set out in Form 34. The contents are basically the same as that in a take-over bid circular plus several other items that are only required in the peculiar circumstances of an issuer bid. Among these are the requirement to state the purpose and

business reasons for the issuer bid - item 10 - and the requirement to provide a valuation of the issuer's securities - item 20.

5. Mandatory Terms

There are several changes in the statutory rules regulating take-over bids which do not fall into the time for acceptance category or the disclosure of information category.

(a) Subsection 89(1)1. requires that a take-over bid and an issuer bid must be sent not only to all holders of the class of securities sought in the bid, but also to those holding securities convertible into or carrying the right to purchase securities of that class. The change makes good sense but, as was noted in the discussion concerning the new definition of take-over bid, if there are enough of these convertible securities or securities carrying the right to purchase voting securities it might be possible to acquire effective control of a company pursuant to an unregulated take-over bid.

(b) In a significant change, and one that was recommended in the Hodgson Report, the offeror may now attach

certain conditions[172] to the offer in addition to the conditions that a minimum number of shares be tendered and that the board of directors of the offeree company not take any action subsequent to the date of the offer which materially changes the undertaking, assets or capital of the offeree company.[173] The latter condition has been altered and three new conditions are now permitted:

(i) The condition in the Old O.S.A. has altered in that the New O.S.A. now refers to actions by the offeree company or its senior officers, in addition to its directors. Further, the threshold level in the condition has been lowered because it now refers to a change which would reasonably be expected to have a significant effect on the market price or value of the securities rather than a material change in the undertakings, assets or capital of the offeree company.[174]

(ii) A bid may be withdrawn if any undisclosed action by the offeree company or its directors or senior officers prior to the date of the offers results in a material change in the affairs of the offeree company.

(iii) A bid may be withdrawn if any undisclosed action prior to the bid or any action subsequent to the bid by anyone other than the offeror, including a governmental or regulatory authority, results in a material change in the affairs of the offeree company.

(iv) A bid may be withdrawn if the required approval of a governmental or regulatory authority is not obtained prior to the expiration of the bid. The C.R.T.C. and F.I.R.A. are obvious examples of such an authority. This condition is a statutory recognition of the practice of the Commission to routinely grant exemption orders to allow conditions along these lines.[175]

(c) Section 92 recognizes that the mail is not reliable and permits take-over bids, issuer bids and varations of both to be communicated by personal delivery or in such other manner as the directors may approve.

(d) Section 90 provides that where a significant change has occurred in the information contained in a take-over bid circular or issuer bid circular while the offer is still outstanding, or where a take-over bid or issuer bid has been varied by changing any of its terms, notice of the change or

variation must be sent to all offeree shareholders. A change that is beyond the control of the offeror, unless it is a material change effecting the affairs of the issuer whose shares are being offered in a share exchange bid, shall not be considered a "significant change". Except where the variation is solely an increase in price, the date of the sending the notice of change or variation shall be deemed to be the date of the take-over bid or issuer bid triggering a further right of withdrawal under subsection 89(1)4. The notice must advise the offeree shareholder of this right.[176]

This is a change from the Old O.S.A. which did not explicitly require that notice of a variation of a take-over bid be sent to offeree shareholders and had no provisions at all concerning a significant change in the information contained in a take-over bid circular.[177]

A situation which highlights the quite drastic consequences of this section occurred in the recent take-over battle between First City Trust and Genstar for Canada Permanent Trust Company.[178] The first bid for Canada Permanent came from First City. It contained a condition requiring 75 percent acceptance before First City was obligated to take up and pay for any shares. Just before the 21 day offer period expired approximately 73 percent of the

shareholders had accepted. To amend or waive the condition would result in a further 21 day offer period and a ten day withdrawal right. The condition was waived and in excess of half of the shares that had been deposited were withdrawn to take advantage of the competing Genstar offer.

One criticism of the provisions in section 90 is that once the notice of change or variation is sent any shares that have not been taken up and paid for may be withdrawn. If millions of shares and thousands of shareholders are involved the offeror may not have had time to complete the mechanical process of paying for the shares, particularly in a share exchange bid, even though it is obligated to take up and pay for them. The section would allow such shares to be withdrawn. It is suggested that the section only allow the withdrawal of shares that the offeror was not obligated to take up and pay for, rather than those that have actually been taken up and paid for.[179]

Another problem with section 90 is the potential for conflict that it creates if other jurisdictions do not have identical legislation. The offeror may be obligated to take up and pay in one jurisdiction whereas in Ontario the offeror may be prohibited from doing so and the offeree shareholders may still have a right to withdraw.[180]

(e) Subsection 89(2) is a new provision in the New O.S.A. prohibiting the offeror from selling any of the securities which are subject to the take-over bid during the offer period. The provision protects offeree shareholders who have tendered under a conditional bid from an offeror who knows its bid will be unsuccessful and wants to sell his securities into the market at prices influenced by the bid or to a rival offeror.

(f) The Old O.S.A. simply provided that if the consideration in the take-over bid was increased during the bid the increased consideration was payable to all shareholders who tendered, even if their shares were already taken up and paid for.[181] The New O.S.A. introduces two new provisions to ensure offeree shareholders all receive the same consideration.

(i) Subsection 89(3) is a result of a recommendation by the Hodgson Report. It deems the price in a take-over bid or issuer bid to be increased to the price paid by the offeror during the period of the offer in the market or pursuant to a private agreement if that price is higher than that in the offer.

(ii) Subsection 91(3) provides that all the holders of

> the same class of securities, that is all the offeree shareholders, shall be offered the same consideration and no collateral agreement with any such holders shall have the effect of providing such holders a consideration of greater value than that offered to other holders of the same class of securities.

Alboini is of the view that an exempt take-over bid or issuer bid is not covered by subsection 91(3) so that it only requires equal treatment of those who tender their shares under a circular bid.[182]

The O.S.C. does not appear to share this view. The Commission's policy is to apply subsection 91(3) to exempt take-over bids, namely a private purchase agreement, that is made either before a take-over bid or during a take-over bid.

The Commission has issued[183] an addendum to Ontario Policy 3-37 which states that if securities are purchased under the private agreement exemption and there is a take-over bid by the purchaser for the same securities within 180 days of the private agreement purchase then, even where a follow-up offer is not required by subsection 91(1), the take-over bid cannot be for less than the private agreement purchase price.[184]

Crawford notes:[185]

> "This is one of the better illustrations that I am aware of where the O.S.C.'s sense of what is fair and just in the context of the capital markets leads them to ignore the specific requirements of the law."

Crawford goes on to add that the policy may not even be desirable because a shareholder may be quite happy to accept a bid at less than a specified amount rather than no bid at all.[186]

As to the use of the private agreement exemption during a take-over bid, the Commission has decided that an offeror with an outstanding take-over bid may not use the private purchase agreement exemption to purchase shares of the offeree company.[187] They rested their decision, in part, on the argument that a private agreement during a circular bid must necessarily involve different terms and conditions than the circular bid and that it would thus be extremely difficult to enforce subsection 91(3) in connection with such private purchases.

The provision is explicitly subject to section 99 under which the Commission can: decide whether consideration proposed to be offered is equal in value to the greatest consideration paid; decide that a collateral agreement is not

made to increase the value of the consideration offered; and exempt anybody from the requirements of Part XIX.

(g) One further change in the general provisions is worthy of note, the addition of subsection 91(2) to the New O.S.A. This is an anti-avoidance provision regarding use of take-over bid exemptions. The way it works is that a bid made pursuant to any of the exemptions in subsection 88(2) in the circumstances set out in subsection 91(2) will trigger the follow-up offer obligation. Normally, of course, the follow-up offer obligation would only be triggered if the private purchase agreement exemption was used. The special circumstances in subsection 91(2) are:

(i) the offeror acquires control of the offeree company and as a consequence acquires control of another company that is not a private company - the true target company; and

(ii) the offeror knows that the take-over bid forms part of a series of transactions initiated by a present or former shareholder in the true target company, who had control of the true target company, to sell his shares in a manner that would avoid the follow-up offer obligation.

If these conditions are met and the initiator of the transaction received a 15 percent premium for his shares in the true target company, directly or indirectly, the offeror must make a follow-up offer as required by subsection 91(1) to the remaining shareholders of the true target company.

6. Enforcement

(a) Offences

The provision making it an offence to contravene the take-over bid provisions are found in a separate part of the New O.S.A., Part XXI. Section 118 makes it an offence to make a misrepresentation in a circular or to contravene the Act or regulations. There are no significant changes in the statutory offences or penalties.

(b) Denial of Exemptions

Under subsection 124(1) of the New O.S.A. the Commission now has power to deny the statutory take-over bid exemptions. Under the Old O.S.A. there was no statutory authority to deny take-over bid exemptions where the Commission thought that the exemption was being abused.[188] This is a very significant change because the Commission is guided only by its assessment of the public interest. The

Commission, in effect, has the power to amend the take-over provisions on a case-by-case basis.[189] Because of the difficulties involved in interpreting the exemptions in subsection 88(2) the Commission can take a very active and interventionist role in administering the take-over bid provisions.

(c) Civil Liability

The New O.S.A. expands the civil liability provisions relating to take-over bids in the Old O.S.A.[190] and these new provisions also apply to issuer bids.

Under the Old O.S.A. a right of action for damages was only available if the take-over bid or directors' circular contained a material false statement. There was no right of action for damages for an omission to state a material fact. The omission to state a material fact in a take-over bid circular gave rise to right to recision, but there was a 90 day limitation period on this right.

Under the new O.S.A. section 127 provides a right of action for damages or recision where a take-over bid circular or issuer bid circular contains a misrepresentation,[191] and there is a right of action for damages where a directors' circular contains a misrepresentation.

The expansion of civil liability coupled with the available statutory defences is reasonable in view of the freedom from review circulars enjoy. The Act is self-enforcing in this respect.

7. Proposals for Reform

The O.S.C. has recently recommended to the Ontario government that certain amendments be made to the New O.S.A.[192] The proposed amendments are the result of two earlier drafts which were published in the Weekly Bulletin with requests for comments. Four significant changes in the take-over bid and related provisions are recommended.

(a) The most significant change is that the threshold level for take-over bids would be lowered from 20 percent to ten percent. A further change is that instead of referring to "outstanding voting securities", the proposed new definition of take-over bid refers to "voting rights attached to the voting securities of the company or other issuer that would be outstanding on exercise of all currently exercisable rights of purchase, conversion or exchange relating to voting securities". In addition, the definition of voting security would be expanded to include securities or options convertible into a voting security.

The change to count voting rights on a fully diluted basis by itself could actually operate to raise the threshold level of what a take-over bid is in some circumstances. In any event the change is logical and would close any possible loophole in the definition of take-over bid. Changing the percentage from 20 percent to ten percent is another matter because it represents a shift in policy to regulate more and more transactions. Albeit the C.B.C.A. already has a ten percent threshold level in its definition of take-over bid, but the administrators of that Act do not get involved in regulating take-over bids to the same extent that the O.S.C. does and the C.B.C.A. does not contain a follow-up offer obligation. As a practical effect the change would expand the role of the O.S.C. in regulating take-over bids and make interpretation of the qualifications in the exemptions more important.

(b) Another proposed change is that while a take-over bid is outstanding anybody other than the offeror who acquires 2.5 percent or more of the voting securities of the offeree must report that purchase within three days of the acquisition. Under the present rules acquisitions only have to be reported within three days if 20 percent is acquired pursuant to an exemption or an additional five percent is acquired.

The amendment would have the effect of rapidly exposing any plans to stave of a take-over by getting friendly companies to buy shares. It was alleged that there was such a plan in the unsuccessful take-over bid by Campeau Corporation for Royal Trustco.

(c) An amendment is proposed that would create a new offence and a right of action in the event that a potential offeror or those in a special relationship with the offeror tip others as to the potential bid before it has been generally disclosed.

The provision will be very hard to enforce. It is designed to strengthen the rules against the abuse of confidential information in a take-over bid situation, one area in which offeree shareholders are particularly vulnerable.

(d) One further change in the insider rules will have an effect on take-over bid strategy, a proposed acceleration of the period in which initial insider trading reports must be filed from ten days from the end of the month in which the insider became an insider to ten days from the time the insider became an insider. Under the Old O.S.A. it was possible for an offeror to buy just less than 20 percent and keep the purchases secret for up to 40 days. The proposed

amendment will reduce this period to ten days, significantly reducing the time potential offerors have to maneuver in a take-over bid.

C. Differences Between the New A.S.A. and the New O.S.A.

The take-over bid and related provisions in the New A.S.A. are modelled very closely on the provisions in the New O.S.A. The Alberta legislation does not follow the Ontario lead slavishly, however, and there are some important differences between the two pieces of legislation.

1. The biggest difference between the New O.S.A. and the New A.S.A. is that the New A.S.A. does not qualify the private agreement exemption with a follow-up offer obligation. Alberta made a policy decision not to include such an obligation. The writer surmises that the advisors to the Alberta legislators felt that there were not compelling enough reasons to interfere with the fundamental right to dispose of property as one sees fit, that any fairness the follow-up offer obligation would effect would be outweighed by the detrimental effect on the capital markets by those who perceived a follow-up offer obligation to be an unwarranted governmental interference with their right to sell at a premium that which they themselves had either acquired at a premium or built up through their own entrepreneurial efforts.

One practical effect of this difference may be to make the capital markets in Alberta more attractive in comparison to Ontario's and this may result in some economic benefits for Alberta. A more immediate practical effect is that it leads to inter-jurisdictional conflict between Alberta and Ontario and this will be discussed further in Chapter V.

2. Unlike the New O.S.A. in its present form the definition of take-over bid in the New A.S.A. covers offers for both voting securities and rights to voting securities, and the 20 percent threshold level is calculated as if the rights to voting securities owned by the offeror or that are the subject of the offer had been exercised.[193] Any loopholes that existed in definition used in the original take-over bid legislation have been closed.

3. A very interesting difference between the New O.S.A. and New A.S.A. concerns variations in the take-over bid. Under the New O.S.A. if there is a competing take-over bid while the take-over bid is outstanding it is not a significant change because it is beyond the control of the offeror and if the offeror only increases the price offered no further right of withdrawal arises.[194] Under the New A.S.A. the mere fact that a competing take-over bid is made gives offeree shareholders an automatic right to withdraw

shares deposited, but not yet taken up and paid for, within ten days of the date of the competing bid.[195] This difference increases the likelihood that an attractive competing bid could be successful. The practical effect is to creat an auction market that has the potential to provide offeree shareholders with greater consideration for their shares. It is a fundamental change in basic contract law principles, however, and may discourage potential offerors from making take-over bids because it increases the uncertainties they will face.

4. Unlike the New O.S.A., the New A.S.A. has a specific provision prohibiting communications by the offeror, the offeree company, or directors of either, with the offeree shareholders that are not specifically authorized by the legislation.[196] An exception provides that notices that a circular or other authorized document has been issued are permitted.

5. The only other difference worth noting between the New O.S.A. and the New A.S.A. on take-over bids is in the related insider trading provisions. The New A.S.A. has already effected a change that is still only proposed in Ontario, namely that initial insider trading reports must be filed within ten days of the insider becoming an insider, rather than ten days from the end of the month in which it

occurs.[197] As noted earlier, this provision effects the strategy employed in take-over bids by limiting the time in which the initial position taken by an offeror can remain secret. Rival offerors, the offeree company and offeree shareholders are alerted earlier to a potential take-over bid.

CHAPTER V

THE FOLLOW-UP OFFER OBLIGATION AND AND THE STOCK MARKET PURCHASE EXEMPTION

A. The Follow-Up Offer Obligation

The private agreement exemption allows the sale of control of a company by the controllers at a premium which is often not offered to the other shareholders. The Kimber Committee made a clear policy decision to allow such transactions to go unregulated and this decision was reflected in the 1967 legislation.[198] The rationale behind this exemption is that the vendors in such circumstances do not need the protection of the Act because they are in an equal bargaining position and either have or can obtain the information necessary to a decision whether to sell.[199] This policy decision appears to be inconsistent with the general purpose of the take-over bid provisions proposed by the Kimber Committee which was to protect offeree shareholders from the potential for unfair and unequal treatment inherent in the take-over bid technique. The Kimber Committee simply stated:[200]

> "The Committee recognizes that, as a result, its recommendations will not embrace situations where control of a public company changes hands under circumstances in which the general body of shareholders is not afforded the same opportunity to dispose of their shares (at a

> possible premium over market) as is enjoyed by a control group. We are of the opinion that the evolution of a legal doctrine which may impose upon directors or other insiders of a company who constitute a control group a fiduciary duty toward other shareholders of such company in cases of change of control is, apart from insider trading aspects, a matter to be left to developments by the judicial process."

The exemption has always been controversial. As early as 1968 two transactions in which the private agreement exemption was utilized were criticized because directors of the offeree company participated on terms not available to small shareholders.[201] In the first transaction, the directors of Argus Corporation sold their 11 percent interest in Canadian Breweries Ltd. to Rothmans of Pall Mall Canada Ltd. for $12.00 a share in June 1968 and the president of Rothmans took over from an Argus appointee as chairman of Canadian Breweries. The stock had risen to a three year high of $9.62 on rumors of a take-over, but no offer was made to minority shareholders.[202] In the second, Seaway Hotels Ltd. of Toronto bought 52.5 percent of Levy Industries from Ben Levy and members of his family in October 1968. The Levys received a combination of cash and stock valued at $48.95 per share which worked out to approximately $22 million in cash. Early in December 1968 Seaway offered three $15.00 convertible preference shares per Levy share to the minority shareholders, but no cash.

Stanley Beck, in commenting on the transactions, said they were perfectly proper and that the owner of a controlling interest is in much the same position as the owner of a key lot in a new development. Because of its strategic position and importance such an asset is more valuable than the identical interests of different lot owners or smaller shareholders.[203]

In the United States the Williams Act[204] requires that cash tender offers for more than five percent of any class of equity security must be made to all shareholders of that class. There is no private agreement exemption. As of December 1970 this also applied to stock tender offers.[205]

The issue was dealt with by the Merger Report in 1970. They broke the issue down into two policy questions along the lines noted by Johnston:[206] first, should there be a private agreement exemption for sale of control with or without a premium; second, if there is a private agreement exemption should the law require a subsequent general offer to all shareholders or some other means of dividing up the premium.

Dealing with the elimination of the exemption the Merger Report stated:[207]

> "Such a conclusion would reduce incentive to a common denominator, including the incentive to control, manage, build, and divest to take the benefit of those efforts. The solution providing equality is simple. The result of such a solution would be profound."

In dealing with the second question, the Merger Report considered the situation under the City Code in Britain which requires directors who effectively control and controlling shareholders represented on the board of directors not to sell without obtaining the undertaking of the offeror to extend a comparable offer to the remaining shareholders.[208] The Merger Report rejected this approach on the grounds that it would be a move "further down the road toward removing all incentive for entrepreneurship".[209] The Merger Report concluded that control persons had not abused their positions so as to require special treatment as a matter of securities legislation:[210]

> "Accordingly we find no reason to recommend deviating from the conclusions reached in paragraph 3.12 of the Kimber Report that as to questions of fairness between shareholders this is a matter for corporation law and the courts. Securities legislation may then follow the lead given."

The conclusion is a simple but not particularly meritorious way of dealing with a contentious issue, because there was little indication that either corporation law or the courts were moving to deal with this particular issue in Canada.

Shortly after the Merger Report, however, there was an interesting Ontario case which might have helped to resolve the issue were it not settled at the interlocutory stage, Farnham v. Fingold.[211] The defendants were a control group of insiders and directors of Slater Steel Industries Limited, an Ontario company. Slater Steel disposed of a major asset and its cash made it a take-over target. Stanton Pipe Limited offered to buy the control group's shares at a premium. The control group accepted and proceeded to buy as many shares in the market as possible to enhance their profit. In addition, they artificially lowered their number to less than 15 to avoid the take-over bid provisions.

Farnham brought a class action on behalf of the non-controlling shareholders alleging, inter alia, a breach of fiduciary duty by the controllers and asking for distribution of the premium the controlling group had obtained. The defendants made an interlocutory application to strike out the statement of claim on the grounds, inter alia, that no cause of action was disclosed and that the permission of the court was required to bring such an action. Much of the judgment of the lower court and the Court of Appeal was concerned with whether the action was properly constituted as a class action or whether it was a derivative action, but the lower court did say there was an arguable cause of action and that the claim should not be arbitrarily

dismissed simply because it was novel. This finding was not disturbed on appeal. The lower court suggested that when the controlling shareholders are offered a premium for their shares by virtue of their control position they were under a fiduciary duty to inform all shareholders of the offer or at least not to take advantage of the offer at the expense of other shareholders.

The fact that the control group went into the market with insider knowledge and purchased shares, coupled with the fact that Stanton Pipe Limited's offer was only artificially an "exempt offer" were key factors in the court's finding and it probably would not have so found if these factors were not present. The decision can be criticized for confusing the abuse of insider information with a fiduciary duty of a control group not to sell their shares at a premium not available to other shareholders. The abuse of insider information was not in agreeing to sell shares at a premium, but in actively soliciting shares from other shareholders without disclosing to them that an offer at a premium had been made. This fact, coupled with the present insider trading provisions,[212] distinguish the situation in _Farnham v. Fingold_[213] from that in _Percival v. Wright_[214] where the shareholders approached the directors to sell their shares when, unknown to them, the directors were attempting to sell the whole undertaking.

Farnham v. Fingold is a confused and inconclusive case, but it would appear that the common law in Canada is that in the absence of fraud, negligence or some other unusual circumstance, there is probably no fiduciary duty or other basis to impose liability on directors and other insiders making up a control group if they sell their controlling interest at a premium.[215]

The jurisprudence in the United States is not quite so clear. The leading case is Perlman v. Feldmann.[216]

Before Perlman v. Feldmann the common law position was much the same as that which presently exists in Canada though a very extensive jurisprudence had developed.[217] The Perlman v. Feldmann case left things unsettled, but the decision in the case would appear to rest on its very peculiar facts.

The litigation arose from circumstances which occurred during the Korean War. The defendant Feldmann, his relatives and associates owned 37 percent of the outstanding shares of Newport Steel Corporation. Feldmann controlled Newport, being its dominant shareholder, chairman and president. Newport produced steel sheets for sale to manufacturers of steel products. During the Korean War there was a shortage of steel, but the steel producers such as

Newport patriotically maintained pre-war prices. Steel buyers without sufficient steel were not able to obtain a secure source of supply by agreeing to pay higher prices. A syndicate of buyers formed Wilport Company and purchased the 37 percent interest in Newport controlled by Feldmann for \$20.00 a share. The market price was less than \$12.00 and the book value was \$17.00. When Wilport had control of Newport it caused Newport to supply steel to the members of the syndicate for the same price it had supplied steel to its previous customers. The plaintiff Perlman, a minority shareholder in Newport, brought an action claiming that Feldmann must account to the minority shareholders for that share of the sale price which was attributable to the sale of control. The theory of the complaint was that the price paid for the stock included a premium for the sale of a corporate asset, the power to determine the allocation of the corporate output in a period of short supply.[218] The defendants argued that the transaction was merely a sale of shares and that control was an attribute inseparably attaching to the control block whose value could not be determined.

The court of appeals ruled in favour of the plaintiffs. The court determined that part[219] of the purchase price was to be allocated to the power to control the management and thereby to capture the corporation's product. This premium was to be shared by the defendants

with the plaintiffs to the extent of their respective stock interests rather than being awarded to the Newport Corporation.

Perlman v. Feldmann fit partially into the paradigm of a "looting" case[220] in that Feldmann knew that Wilport's motive in purchasing control was to appropriate a secure supply of steel. What was different was that for the first time in such a case the vendor was found liable even though it was not clear, and the plaintiffs certainly had not proved, that the corporation and the remaining shareholders had suffered any damage.[221]

Following the case a great number of articles and comments appeared[222] examining its implications for the development of broad fiduciary duties to be imposed upon controlling shareholders in future cases, but there have been no significant developments in the case law in this area.[223] In 1965, however, a Harvard professor, William D. Andrews, wrote an important article in which he extensively analyzed Perlman v. Feldmann and intepreted it as a precedent for an expansive rule that every shareholder of the same class of shares is entitled to have an equal opportunity to sell his shares or a pro-rata part of them on substantially the same terms.[224]

One critic of Andrews' position suggested that Andrews underestimated the cost of his preventive rule in restraining beneficial transactions by imposing increased costs on the purchaser.[225] The purchaser might not be willing to meet these higher costs, even if the investment value of the additional shares is the same and the purchaser could arrange financing - because it might be sensible to decline to buy more than the bare amount necessary for control on the principles of diversity of risk and opportunity.[226]

Further, modern corporate law contains several remedies to protect minority shareholder's rights.[227] It is suggested that an equal opportunity rule or follow-up offer obligation should not apply across the board, because those circumstances where either the common law or the statutory corporate law do not apply, and where there is some other factor present beyond the mere payment of a premium, will be rare.[228] The assumption underlying the equal opportunity rule is that the evil to be prevented is either so great or so certain that any good which the rule will prevent must be sacrificed.[229] There is no proof that this assumption is true.

The next development in Ontario after the Merger Report and Farnham v. Fingold was the report of the Hodgson

Committee in 1973.[230] The Hodgson Report noted that the City Code prohibits, as a practical matter, the transfer of effective control unless a general offer is made not only to holders of the same class of shares but also to the holders of any other class of equity share capital.[231] Whether to require such a general offer in Ontario seriously divided the members of the Hodgson Committee. The majority felt that the private agreement exemption from the take-over bid provisions should be maintained in its current state without any follow-up offer requirement for the following reasons:[232]

(i) shares in a corporation are personal property and the controlling shareholder should be free to dispose of his shares as he thinks fit in the absence of cogent and overriding reasons;

(ii) to abolish the exemption or to impose a follow-up offer obligation would reduce the incentive for a person to develop and manage a business by denying such a person a premium for his efforts;

(iii) a follow-up offer obligation could impose an economic hardship on the prospective purchaser, and only those that could afford to buy all the shares would buy the controlling shares;

(iv) the follow-up offer obligation would be embodied in a statute rather than the situation in Britain where it is in the City Code which is only of persuasive force.

There are at least two other cogent reasons that are related, but which were not mentioned by the majority. First, a follow-up offer obligation would discourage public ownership of companies both because owners of private companies might be adverse to sell non-controlling interests if they were uncertain of their ability to sell their controlling interest at a later date and because the follow-up obligation would tend to result in 100 percent ownership by the offer.[233] Second, because only the controllers of large pools of capital could afford to make follow-up offers the follow-up offer obligation would further concentration of ownership of companies.[234]

The minority of the Hodgson Committee were of the view that the private agreement exemption should be maintained but that if it is used to acquire control it should be conditional on the person acquiring control making a follow-up offer within a reasonable period for all the remaining shares of the same class.[235] The minority reasoned that the argument that the follow-up offer obligation would remove any incentive for entrepreneurship

was weak because conceptually each share is the same as every other share of the same class. The minority reasoned, further, that when a controlling shareholder sells control he is actually selling corporate assets and the control over those assets which belong to all the shareholders, not merely the controlling shareholder.[236] The minority rejected the argument that a follow-up offer would cause economic hardship to offerors.

The minority felt that the consideration offered in the follow-up offer should be identical to that received by the control shareholders, but they could see no objection to offering securities in the alternative.[237] They also wanted to see notice of the follow-up offer given to the holders of any shares, options, debt securities or warrants that were then capable of being converted into shares of the class involved so that the holders of these securities could convert and participate in the follow-up offer if they chose to do so.[238] Further, the minority were of the view that some flexibility was desirable, and that the Commission should have the discretion to exempt offerors from making a follow-up offer.

Early drafts of the New O.S.A., Bills 154, 75 and 98[239] continued the private agreement exemption unchanged. Bill 20,[240] however, which was introduced for first reading

on April 5, 1977, deleted the private agreement exemption completely. The exemptions for private companies and stock market purchases and by Commission order were retained, but severe limitations were imposed on the stock market purchase exemption.[241] Johnston suggests that the framers of Bill 20 must have concluded that the maintenance of the private agreement exemption was no longer justified, despite the inconvenience entailed by subjecting many small size transactions to legislative requirements and the undoubted sophistication of many of the offeree shareholders in such transactions, possibly because the exemption was abused.[242] The practical effect of these changes was that all shareholders would receive timely notice of attempts to take-over control and be able to participate on an equal basis.[243] The sale of control at a premium not available to everyone would no longer have been possible.

A further version of the Act, Bill 30,[244] did not contain the private agreement exemption either. The final version of the Act, Bill 7, which was enacted as the New O.S.A., resurrected the private agreement exemption but, after an eight to seven vote in committee,[245] inserted a follow-up offer obligation along the lines suggested by the minority in the Hodgson Report.

Only Ontario has a follow-up offer obligation. The

New A.S.A. retains the private agreement exemption unaltered and does not impose any follow-up offer obligation. Among the other uniform act provinces, British Columbia and Saskatchewan have not yet enacted new securities legislation and Manitoba has enacted but not yet proclaimed a new Securities Act modelled on the New O.S.A. that contains a follow-up offer obligation.[246] Apparently Manitoba is waiting for certain amendments that the O.S.C. has proposed for the New O.S.A.[247] to be enacted and then they will follow suit with their legislation.[248] Quebec has put forward a working paper for new securities legislation which would not contain a follow-up offer obligation, but which would restrict the private agreement exemption to single families.[249] The Atlantic provinces have not made any move to amend their securities legislation. The C.B.C.A. does not contain a follow-up offer obligation and there are no moves afoot to change that situation.

1. <u>The Statutory Provisions</u>

(a) <u>Triggering the Obligation</u>

The follow-up offer obligation is found in subsection 91(1) of the New O.S.A. which reads as follows:

> "Where a take-over bid is effected without compliance with section 89 in reliance on the

> exemption in clause c of subsection 2 of section 88, if there is a published market in the class of securities acquired and the value of the consideration paid for any of the securities acquired exceeds the market price at the date of the relevant agreement plus reasonable brokerage fees or other commissions, the offeror shall within 180 days after the date of the first of the agreements comprising the take-over bid, offer to purchase all of the additional securities of the same class owned by security holders, the last registered address of whom is in Ontario or in a uniform act province, at and for a consideration per security at least equal in value to the greatest consideration paid under any such agreements, and that offer shall be a take-over bid for purposes of this Part."

All the conditions in this subsection must be met before the obligation arises.

(i) There must be a take-over bid as that term is defined in subsection 88(1)(k). The key ingredient here is the arbitrary test of effective control. If the offeror either has or acquires more than 20 percent of the outstanding voting securities of the offeree company the acquisition is a take-over bid.

(ii) The acquisition must be effected in reliance on the private agreement exemption found in subsection 88(2)(a). A take-over bid effected by any other means will not trigger the obligation.[250]

(iii) There must be a public market in the class of securities acquired pursuant to the take-over bid.

Published market is defined in subsection 88(1)(j) as a stock exchange recognized by the Commission for this purpose on which such securities are listed or any other market on which such securities are listed if the prices at which they are have been traded on that market are regularly published in a newspaper or business or financial publication of general and regular paid circulation. The lack of a published market in Suncor Inc.'s shares was relied upon by Ontario Energy Resources Corporation in their initial refusal to make a follow-up offer to the 700 minority shareholders of Suncor Inc. Ontario Energy had purchased a 25 percent interest in Suncor in a private agreement with Suncor's parent company.[251]

(iv) Finally, the offeror must have paid a premium of 15 percent over the published market price. In fact, for the purposes of subsection 91(1), subsection 162(3) of the Regulations defines "market price" on a particular date as the amount 15 percent in excess of the simple average of the closing price for each day on which there was a market price and falling not more than 10 business days before the relevant date. If the Commission decides that the market price was artificially high because the

published market was affected by an anticipated take-over bid or by improper manipulation it has the power under subsection 99(b) to determine the "market price" excluding any change attributable to the anticipated take-over bid or to the improper manipulation.

Whether to make a determination that the "market price" was less than the actual price paid in a take-over bid effected under the private agreement exemption was the subject of a recent O.S.C. hearing.[252] Alberta Energy Limited had purchased 28 percent of British Columbia Forest Products from Noranda Mines Limited for $25.00 a share. Several minority, but by no means unsophisticated, shareholders of British Columbia Forest Products thought that the market price was effected by an anticipated take-over bid for British Columbia Forest Products and asked the O.S.C. to make a determination that the published market price for the previous 10 ten days would have been below $21.73 but for such anticipation.

It seems like a ludicrous determination to have to make, that the market price was not really the market price because it was affected by a rumor. Rumors are always affecting market price. That is part of the whole idea of a free auction market. Provided there is no trading on the

basis of confidential inside information or manipulation, the market price is an accurate reflection, the only one, of what the public perceives the price should be. Further, there is the problem of such a determination being part of a self-fulfulling prophesy. The Commission noted:[253]

> "Accordingly, just as the Commission must be vigilant to protect minority security holders so to it must be vigilant not to abuse the rights of majority security holders. A security holder to whose securities actual control is deemed to attach should not be put in the position of being unable to dispose of its block without the purchaser making a follow-up bid because the market players anticipated a second take-over bid, either by a third party or a follow-up bid by the offeror, with no evidence upon which such anticipation could reasonably be based. In such a case the result might be a self-fulfilling prophesy, a "Catch 22" situation, which would inevitably require a follow-up bid."

Nonetheless, the Commission found that though there had been no improper manipulation the market had been affected by an anticipated take-over bid and determined that the "market price" was less than $25.00. Consequently, Alberta Energy Company Limited would have been required to make a follow-up offer for the remaining shares of British Columbia Forest Products. Fortunately for Alberta Energy Company the Commission decided the transaction was not "prejudicial to the public interest" and granted an exemption under subsection 99(e).

(b) Exemption From the Obligation

When the follow-up offer obligation in the New O.S.A. was under detailed examination by the Administration of Justice Committee of the Ontario Legislature it was so controversial that the then Minister of Consumer and Commercial Relations found it necessary to make a statement to the Committee regarding the method by which the enforcement of the obligation would be effected.[254] The Minister recognized that situations could arise in which the follow-up offer obligation could impede or even prevent the consumation of a desirable transaction. He cited two examples of transactions that should be exempted even though, technically, they might trigger the obligation:

(i) where a control block is held outside Canada overriding economic interests might dictate that repatriation of that control block should be permitted even if a premium must be paid; and

(ii) where the sale of a comparatively small number of shares might tilt the balance of control it is doubtful that the follow-up obligation should be imposed.

The Minister noted that while there were provisions allowing

the Commission to grant exemptions there were no guidelines as to circumstances in which the discretion would be exercised and indicated that he had instructed the O.S.C. to prepare such guidelines. This resulted in Ontario Policy No. 3-41.[255]

The statutory exemptions are found in section 99 of the New O.S.A. They give the Commission a considerable degree of discretion to grant an exemption on application by an interested party, generally the offeror. The onus is on the applicant to establish the necessary grounds which would permit the O.S.C. to make the appropriate exemption order. The grounds are twofold:

(i) Subsection 99(a) permits an exemption if the Commission determines that the offeror will not or did not acquire the power or authority to control the business or affairs of the offeree company as a result of the take-over bid.

(ii) Subsection 99(e) permits an exemption where in the Commission's opinion it would not be prejudicial to the public interest to do so.

The application of the subsection 99(a) exemption is highlighted by the McLaughlin case.[256] S.B. McLaughlin

Associates Ltd. was controlled by Stuart Bruce McLaughlin who was the beneficial owner of 52.9 percent of the outstanding shares or 49.6 percent on a fully diluted basis. On September 16, 1980 McLaughlin purchased 150,000 shares at $12.24 in a private agreement to give him beneficial ownership of 57.9 percent of the shares of the company or 54.3 percent on a fully diluted basis. The transaction met all the requirements to trigger the follow-up offer obligation:

(i) it was a take-over bid;

(ii) relying on the private agreement exemption;

(iii) there was a published market for the shares; and

(iv) the price paid was 15 percent above the published market price,

but McLaughlin just assumed that because he already had control before the transaction that he was not caught.[257] The Commission demanded he make a follow-up offer, however, and eventually there was a hearing of an application by McLaughlin for an exemption under subsection 99(a). McLaughlin did not make an application under subsection 99(e). The Commission took the view that an exemption under subsection 99(a) was only available if there was doubt that the applicant acquired control and decided that the exemption was not available to an offeror who already had control and was merely consolidating it. The Ontario Divisional Court

dismissed McLaughlin's appeal of the O.S.C. decision on the narrow ground that the exemption was permissive and not mandatory.[258] The decision was criticized in the Interim Report[259] as a perverted use of the follow-up offer obligation to cure a perceived insider trading abuse by a controlling shareholder. The Interim Report went on to comment that, if the timely disclosure and insider trading provisions of the legislation were complied with, they could see nothing inherently abusive of minority shareholders' rights for an insider to purchase shares by private agreement at above market price simply because the purchaser is an insider and irrespective of whether effective control is acquired. They felt that the follow-up offer obligation should not be imposed unless the purchaser either acquired effective control as a result of the transaction or it could be demonstrated that it was one in a series of transactions whereby effective control was acquired.[260]

The application of the subsection 99(e) exemption is discussed in Ontario Policy No. 3-41. The Policy sets out several specific situations representative of the kinds of circumstances in which the Commission might give favourable consideration to an application under subsection 99(e):

(i) Repatriation of a controlling interest in a Canadian company.

(ii) Purchase of a controlling interest by employees of the company or members of the family of the controlling shareholder. The Policy notes that:

> "The consequence, if the follow-up offer obligation were to be applied, might be to discourage the controlling shareholder from retiring, or to force him to sell the shares to a less desirable third party. Either result might be undesirable."

(iii) Waiver of the right to a follow-up offer by a vote of the minority shareholders passed by a two-thirds majority, presumably because they feel a transfer of control would be in their best interest.

(iv) Where the control block is transferred pursuant to a bona fide corporate reorganization within a group of controlled companies.

(v) Where the consideration required by subsection 91(1) is made available to the other shareholders in circumstances that do not technically qualify as a follow-up offer such as pursuant to an amalgamation or an arrangement.[261]

(vi) Where the offeror is required to purchase control involuntarily.

It is clear from these situations that are described in the Policy, particularly (i), (ii) and (iii), that the Commission is aware that the imposition of a follow-up obligation can have very severe consequences for the offeror, severe enough that the offeror will not make the offer if the obligation is going to be imposed.

2. Problems With Application and Enforcement

(a) Equivalent Consideration

Once it is established that the follow-up obligation exists section 91(1) requires the offeror to make an offer to purchase all the additional securities of the same class "for a consideration per security at least equal in value to the greatest consideration paid" under one or more prior agreements entered into by the offeror.

Theoretically the offeror will value the private agreement consideration and then simply ensure the consideration per security to be offered to the remaining shareholders under the follow-up offer is at least equal in value. This would be simple if only cash was offered in consideration. Problems of interpretation arise, however, when the consideration in either the private agreement or the follow-up offer consists wholly or partly of securities.

Most of these problems have now been worked out through various cases brought before the Commission in the last few years and this is the result:[262]

(i) The relevant date for determining the value of the private agreement consideration is the date of the private agreement.

(ii) The value of securities is normally the market price as of the relevant date, but if a large block securities that was recently acquired by the offeror is involved the value is the cost to the offeror.

(iii) The relevant date for determining the value of the follow-up offer consideration is the date of the follow-up offer.

(iv) If more than 180 days elapses between the private agreement and the follow-up offer the time value of money must be reflected in the follow-up offer consideration.

The equivalency requirement provides an opportunity for offeree shareholders who are not satisfied with the value of the follow-up offer consideration to use the Commission as

a weapon in their dispute. This is what happened in the take-over of Merland Explorations Ltd. by Turbo Resources Ltd. Some Merland shareholders felt the follow-up offer consideration was not equivalent to the price paid by Turbo for the control block of shares.

In the summer of 1981 Turbo purchased 51 percent of Merland in two steps. They first purchased a 27 percent position in Merland from an offshore company for $13.13 per share in a cash transaction. This position was increased quickly to 51 percent through a partial take-over bid on the Toronto Stock Exchange.[263] Turbo did not feel that they were obligated to make a follow-up offer under subsection 91(1) because neither Turbo nor Merland were Ontario companies and the private agreement for 27 percent was concluded outside Canada.[264] To obtain the T.S.E.'s and O.S.C.'s permission to make the exchange bid, however, Turbo voluntarily agreed to make a follow-up offer to the remaining shareholders that was at least equivalent to the $13.13 per share they had paid under the private agreement and were going to pay on the stock exchange. Because of the falling stock market, particularly in resource issues, and rising interest rates Turbo was not able to offer cash consideration in the follow-up offer. Instead they offered shares and warrants in a partly owned subsidiary, Bankeno Mines Ltd. Bankeno was to be restructured in a complicated asset exchange between Turbo, Merland and Bankeno.[265]

Minority shareholders in Merland, led by Dominik Dloughy, president of Maison Placement Canada Inc., concluded Turbo's offer was not equivalent to $13.13 a share. They asked the O.S.C. for a ruling that the offer was insufficient.[266] Turbo claimed its offer was for equivalent consideration and objected to the O.S.C.'s jurisdiction to decide whether their offer was equivalent.[267] Turbo stated that their obligation to make a follow-up offer was a contractual commitment, made at the time of their stock exchange take-over bid and not pursuant to subsection 91(1).[268] The result was a series of hearings before the O.S.C. and the Supreme Court of Ontario. The decisions have gone against Turbo so far. The O.S.C. ruled that Turbo's offer was not equivalent to $13.13 a share.[269] The Supreme Court rejected Turbo's argument that Turbo was not bound by the New O.S.A. in making the follow-up offer[270] and ordered Turbo to make a follow-up offer for consideration that O.S.C. would find to be equivalent.[271]

In the attendant publicity not enough Merland sharholders tendered under Turbo's follow-up offer to provide Turbo with at least the two-thirds control of Merland it was seeking.[272] Consequently, Turbo has been unable to ease its debt burden by amalgamating with Merland and must re-schedule its debt or face the very real possibility of being placed in receivership.[273]

In seeking the Ontario Supreme Court order to force Turbo to make a better offer the O.S.C. argued that the order was necessary to maintain the integrity of and public confidence in the capital markets.[274] A journalist in the Financial Post applauded the minority shareholders in Merland who complained to the O.S.C., claiming that the publicity will give Ontario's follow-up offer obligation more staying power and respect.[275]

Surely there must be something wrong with these sentiments. How can one have respect for a provision that is supposed to maintain public confidence in the securities market if it helped to bring one of the star performers in the Canadian oil industry to the brink of bankruptcy? Is no consideration to be given to the interests of Turbo's shareholders? Because of the dramatic decline of the stock market since the summer of 1981 the deal that was offered to Merland shareholders may not be as sweet as the minority Merland shareholders would like, or that they were led to believe they would receive, but it was not terrible relative to the market conditions at the time.[276]

(b) Extra-Territorial Application

At the time of the enactment of the follow-up offer obligation it was thought that other jurisdictions,

especially the uniform act provinces, would follow suit,[277] but no other jurisdiction presently has such a provision. The O.S.C. puts a very broad interpretation on when a follow-up offer is required, as we saw in the McLaughlin case and in the controversy over Turbo's take-over of Merland, and it has taken this same expansive approach when claiming jurisdiction. The basis of this claim is that an offeror who has access to the capital markets in Ontario, normally by virtue of having its stock listed on the Toronto Stock Exchange, should adopt Ontario's follow-up offer obligation on a "voluntary" basis as a condition of such access. The claim is enforced by using other statutory provisions such as the power to deny trading exemptions or impose a cease trading order.

A good example is the Universal Exploration Ltd. and Petrol Oil and Gas Co. Ltd. case. Universal is a Calgary based company. On September 1, 1981 Universal purchased 65 percent of Petrol from Western Decalta Petroleum 1977 Ltd. of Calgary for a combination of cash, a note and shares worth a total of $10.70 for each Petrol share, a substantial premium over market value. Universal proposed an amalgamation of itself and Petrol which was approved by the majority of the shareholders of each company and the arrangement was approved by the Alberta Court of Queen's Bench. Under the arrangement the market value of the shares that the Petrol shareholders

would receive was less than the $10.70 per share received by Western Decalta, but this was permissible under both the Old A.S.A. and the New A.S.A.

The O.S.C. attempted to disrupt this Alberta deal, however, because Petrol was listed on the Toronto Stock Exchange and it felt that Universal should comply with subsection 91(1) and prove to the O.S.C.'s satisfaction that the deal was fair to the minority Petrol shareholders.[278] This is despite the fact that the control block Universal purchased had never traded in Ontario and the entire private agreement had been completed in Calgary. The O.S.C. imposed various interim orders denying trading exemptions and made interim cease trade orders to temporarily block the amalgamation on the grounds that Universal was unwilling to observe government policy and should therefore be denied access to the capital markets in Ontario.[279] The Alberta Court of Appeal subsequently disapproved of the arrangement.

It is likely in a clear cut case, where the triggering private agreement was not connected in any way to Ontario's capital markets, that the O.S.C.'s jurisdiction to deny exemptions or impose cease trading orders for failure to comply with subsection 91(1) could be successfully challenged.[280] There are two reasons for this. First, it would be very difficult for the O.S.C. to argue that it is

simply exercising its general power to supervise the capital markets of Ontario in determining that this type of activity should disentitle persons from trading in securities in Ontario where the activity is in no way morally reprehensible and is permitted in other jurisdictions.[281] Second, the O.S.C. action could be interpreted as the modification of civil or contractual rights that were created outside Ontario and might be found to be invalid on the basis that it was:

> ". . . neither confined to property and civil rights within the province nor directed solely to matters of merely local or private nature within it.",[282]

as the leading case on the territorial limitation on provincial power, Royal Bank of Canada v. The King, puts it. This is not to say that the provision itself is not within the competence of the Ontario Legislature, only that an action to enforce it by the O.S.C. that interferes with rights in other provinces on more than an incidental basis may be invalid.[283]

3. Possibility of Reform

The O.S.C. is apparently having some second thoughts concerning the efficacy of the follow-up offer obligation. A committee of practitioners in the securities law field has been appointed by the O.S.C. to review the

provisions in the New O.S.A. governing take-over bids. The committee was specifically asked for their views on the question of whether the follow-up offer obligation should be maintained. The committee issued an Interim Report on the follow-up offer obligation in November 1981.[284]

The Interim Report gives a brief summary of the history of the follow-up obligation in Ontario and the various theoretical bases for imposing the obligation. Unfortunately the Interim Report takes it for granted that some form of follow-up obligation or similar obligation should continue to be contained in the New O.S.A.

The most interesting aspect of the Interim Report is its conclusion that Ontario's follow-up offer obligation does not stem logically from any of the theoretical bases for such a policy. The committee notes that a consistent application of either the corporate asset theory, which was touched upon in the discussion of the Perlman v. Feldmann[285] case, or the fiduciary duty theory, the basis for action in the Farnham v. Fingold[286] case, result in the imposition on the vendor in the triggering private agreement of the obligation to distribute the premium pro-rata to all shareholders. Ontario's follow-up offer obligation, however, regulates the conduct of the purchaser. The committee felt that the follow-up offer obligation stemmed most directly

from Professor Andrews' equal opportunity theory, but, because it is tied to the definition of take-over bid rather than the actual acquisition of effective control, that it is much broader.

To make the follow-up offer obligation more in line with the theoretical bases for it the committee suggested that the obligation only apply if the offeror actually acquires effective control in the triggering private agreement to avoid the problem in the McLaughlin case. Further, they suggested that the offer have the option of either making a follow-up offer as presently required or paying the minority shareholders a premium equal to that in the triggering private agreement without having to purchase their shares.[287]

It is astonishing to the writer that a provision such as the follow-up offer obligation, with its tremendous impact on companies who make or are planning take-over bids, would have been enacted with so little understanding of the theoretical basis for it. It seems strange that the very regulators who advocated its enactment and enforce it so rigorously should be trying to figure out exactly why the provision is included in the New O.S.A. two and one half years after it became effective. The writer feels that the provision is just a dramatic example of what can happen if

one concern, protecting offeree shareholders, is allowed to override other important concerns without sufficient forethought as to the consequences.

Because of the controversy surrounding the follow-up offer obligation it is likely that the suggestions in the Interim Report will be implemented. It is hoped, in addition, that the exemptions might be broadened, or at least interpreted more loosely, to lessen the impact of the obligation.[288]

B. The Stock Market Purchase Exemption

As was noted in Chapter IV, the stock market purchase exemption in the New O.S.A. and the New A.S.A. is considerably different than the exemption in the previous legislation. The over-the-counter part of the exemption has been deleted and the exemption has been restricted to purchases made on a stock exchange recognized by the respective securities commission, and then only if it is made according to the by-laws, regulations or policies of the stock exchange.[289] How this change came about is an interesting story of perceived abuse of the exemption as it existed in the old legislation and attempts by the O.S.C. to prevent this abuse through policy changes, attempts which were largely unsuccessful because there was no supporting legislation.

1. The Exemption Under the Old Legislation

The exemption was included in the original take-over bid legislation because it was felt, where a take-over was effected through the stock exchange or in the over-the-counter market with cash consideration, that the free market forces operating in these markets would provide the necessary protection to offerees.[290] No publication or circulation of information was required, nor was there any requirement that trading be halted to permit analysis of the bid.[291] Only the normal insider trading rules applied so that offerors did not have to report that they were insiders until ten days after the end of the month in which they acquired sufficient shares to become an insider. Additional purchases were reported in the same manner.

As noted earlier, a stock exchange bid had to be for cash and no conditions were permitted except the maximum number of shares that the offeror was willing to take up. If the offeror announced a bid for 50 percent of the shares of a company and only 25 percent were tendered, the offeror was obligated to take up and pay for those shares. This placed the offeror at a considerable disadvantage in relation to an offeror making a circular bid. Because there was no minimum period that the bid had to remain open, however, there was much less chance of either a competing bid or the offeree

company mounting a successful defence than if a formal take-over bid complete with circular were made.

The first true test of the stock market purchase exemption occurred in the take-over battle between Rothmans of Pall Mall Canada Ltd. and Philip Morris Inc. for control of Canadian Breweries Ltd. during May and June 1969.

Rothmans had acquired control of Canadian Breweries Ltd. in June 1968 by purchasing the 11 percent control block owned by Argus Corporation for $12.00 per share. Philip Morris put the Canadian and U.S. investment communities into a flurry on May 11, 1969 when it announced that it was going to make a take-over bid for 50 percent of Canadian Breweries shares.[292] Philip Morris owned no shares of Canadian Breweries. The formal take-over offer and circular was mailed May 20, 1969 in compliance with the requirements of the Old O.S.A. It was for $12.00 per share cash.[293] The offer was to expire on June 11, 1969. Breweries shares were trading in the $11.00 per share range at this time. The Breweries board, on which six of the 20 directors were Rothmans nominees, were divided on whether to recommend acceptance of rejection of the bid and announced that they would not issue a directors' circular. Rothmans, which then owned 11.7 percent of Breweries, announced that it was rejecting the bid.[294]

It soon became apparent that someone was buying large quantities of Breweries shares on the stock exchanges because the combined trading volume on the Montreal, Toronto and New York stock exchanges on May 27 and May 28, 1969 was more than five percent of the outstanding Breweries shares.[295] Initially there was speculation that Philip Morris was an active buyer on the exchanges, but when the demand for shares pushed the price on the exchanges to $12.75 per share and Philip Morris increased the consideration in its offer to $15.00 per share on May 29, 1969 it was speculated that Rothmans was behind the activity on the exchanges.[296] The only hard information was that the buying was being done on behalf of a numbered Swiss bank account.[297]

The market price of Breweries shares continued to climb and the high volume of trading continued until June 5, 1969 when the market closed at a record $14.12 per share. Approximately 708,000 Breweries shares worth $9.5 million were traded that day.[298] On June 6, 1969 the market price began to decline until a week later it was done to $9.75 per share.[299]

On June 8th Rothmans announced that it had increased its interest in Canadian Breweries to 50 percent from 11.7 percent by purchasing 8.3 million shares on the

stock exchanges since May 11, 1969 for $116 million.[300] Only six million of the 10.8 million shares sought by Philip Morris were tendered by the expiry of the offer on June 11, 1969 and Philip Morris bowed out of the battle for control.[301]

Several aspects of the take-over are worth noting. First, the exemption had been used for a quick, one shot bid to acquire control of a large public company. The exemption was designed for, but not restricted to, an offeror who wished to add to his holdings over a period of time. Consequently, the bid price may not have been subject to the continuous evaluation on the exchange floor that was the basis for the exemption.[302] Second, the take-over attracted wide publicity but suprisingly little controversy. The contest was settled in the market with hard cash and without the intervention of securities commissions or the courts. Third, it appears from the result that the offeror making the formal take-over offer was at a disadvantage. It should be remembered, however, that there was nothing stopping Philip Morris from going into the market also. Instead Philip Morris chose to rely on its safe, risk free, conditional offer. Rothmans took a chance, spending vast sums and not being sure until near the end that it would acquire the control position it sought. Fourth, there were probably shareholders who lost out, not realizing that a

take-over bid was taking place in the market until Rothmans had achieved 50 percent and pulled out. A pro-rata take up by Rothmans would have been fairer. It must be noted, however, that Philip Morris announced its intention to make an offer back on May 11, 1969, providing ample warning to shareholders to pay increased attention to the market. Indeed, despite the tremendous demand the market price rose only $3.00 per share indicating information concerning the rising market was widespread. Further, the market price never reached the final price Philip Morris offered. It may be that some shareholders did not sell into the market because they did not think the market price was high enough.

The 1970 Merger Report followed soon after the Canadian Breweries take-over. You will recall that two of its recommendations had a direct effect on the stock market purchase exemption.[303] It recommended that anyone who had acquired 20 percent of the equity shares of a company pursuant to the exemption should be required to report that fact within three days of the trade, and the offeror was also to report each additional five percent that it acquired within three days. In addition, the Merger Report recommended that an offeror be prohibited from reducing any pro-rata purchases it might be required to make by purchasing securities in the market during a take-over bid. Both these

recommendations were enacted soon after they were made.[304] While the latter recommendation would have had no effect on the Canadian Breweries battle, the former would have required Rothmans to disclose its position.

The next development following the changes recommended by the Merger Report was a Toronto Stock Exchange notice to its members in 1972 prohibiting them from making use of the market purchase exemption without prior Exchange approval.[305] The Exchange indicated it would grant its approval where the take-over bid was structured to allow fair participation by all shareholders.[306] Following the take-over of Price Company Limited by Abitibi Paper Company Ltd. in 1974 even this requirement was perceived to be deficient.

Abitibi was planning a take-over bid for Price as an inexpensive means of expanding its manufacturing capacity.[307] The Toronto Stock Exchange agreed to a take-over bid through its facilities on the conditions that Abitibi would keep the bid open for three business days, publicize the bid in major newspapers and take up the shares tendered in acceptance of the bid on a pro-rata basis.[308] Price shares were trading in the $12.00 per share range.[309] Before the T.S.E. opened on Thursday, November 14, 1974, Abitibi announced its bid for 49 percent of the Price shares

at $18.00 per share, which bid was to remain open until the T.S.E. opened on Tuesday, November 19. The T.S.E. suspended trading in Price shares for this period. The bid was for cash, of course, and the only condition attached was that only 49 percent of the outstanding shares had to be taken up. Abitibi did not have to send a take-over bid circular to each offeree shareholder nor did it have to keep the bid open for at least 21 days.

The short period that the bid was open for annoyed Canadian Permanent Trust Company which claimed that there was inadequate time to get instructions from the beneficial owners of shares they held. They made a written complaint to the Securities Commission and the bid was extended for an extra day under pressure from the Commission.[310] The most interesting development, however, was a counter-bid through the T.S.E. by Consolidated Bathhurst which was announced on Wednesday, November 20, just before Abitibi's bid was to expire. The bid was for $20.00 per share, $2.00 a share more than the Abitibi bid, for 40 percent of the shares. The 40 percent would be sufficient to give Consolidated control because they had just purchased what was then the control block - a 17 percent interest - from Associated Newspapers, a British company. Through a series of meetings between representatives of Price, Consolidated, the O.S.C., the Quebec Securities Commission, the Toronto Stock Exchange and

the Montreal Stock Exchange, ad hoc arrangements were made to allow Price to make a counter-bid up until 2:00 p.m. Thursday afternoon, November 21. Abitibi raised its offer to $25.00 per share for 51 percent of the shares minutes before this deadline and Consolidated, which under the ad hoc arrangements could then increase its bid, tendered under the Abitibi bid leaving Abitibi with control of Price.

Over 95 percent of the Price shares were legitimately tendered under Abitibi's bid, a clear indication both that shareholders knew of the bid and liked the price, double that at which the stock had been trading.[311] Aside from the written complaint by Canada Permanent prior to the one-day extension the only shareholder that was really dissatisfied with the take-over was Associated Newspapers which lost control of Price. The O.S.C., however, was concerned that even though shareholders were aware of the Abitibi offer, they may not have had time to fully consider matters such as the book value of the shares.[312] The counter-argument is that it should not matter whether the bid is for control or not. If the price bid in the market is high enough, why should it make any difference to the shareholder who is happy to sell at that price whether the rise in price is attributable to a bid for control?[313]

In any event, in December 1974 as a result of the O.S.C.'s concern about the shareholder having time to consider an exchange bid[314] and its concern that certain, rather than ad hoc, rules be established concerning whether trading in the offeree company should be suspended and how to deal with competing bids, the O.S.C. ordered the Toronto Stock Exchange not to permit any more take-over bids on the Exchange until rules the O.S.C. approved of had been drawn up.[315] A similar position was taken by the securities regulators in Quebec and British Columbia, and it was believed that this would effectively close off the stock exchange take-over bid route.

The Montreal, Toronto and Vancouver stock exchanges began working together to draft rules for take-over bids through the exchanges so that the market exemption would be freely available. By the end of 1976 the three exchanges and the securities commissions in Quebec, Ontario and Alberta had adopted a uniform procedure to govern take-over bids on these exchanges.[316] This is now Part XXIII of the Toronto Stock Exchange's General By-Law. There were still difficulties, however, because, though the O.S.C. was satisfied with Part XXIII and viewed adherence to the by-law as a prerequisite to the availability of the exemption, it did not have the force of law.[317] The statutory exemption did not yet have the phrases "a stock exchange recognized by the Commission" and

"according to the by-laws, regulations or policies of the stock exchange". These difficulties are well illustrated in the Cornat-Bralorne, AGTL-Husky and Edper-Brascan take-over bids. We will take a look at these take-over bids before examining the specific requirements of Part XXIII under the New O.S.A.

The first of these take-over bids, the bid by Cornat Industries Ltd. for Bralorne Resources Limited in August and September, 1976, occurred before Part XXIII became effective. The Toronto Stock Exchange had proposed its Part XXIII rules by this time and the Vancouver Stock Exchange had promulgated certain rules in August 1975 which were not quite as stringent as the proposed Part XXIII. Representatives of Cornat and Bralorne informed the O.S.C. that Cornat was planning an exchange take-over bid for 50.5 percent of Bralorne. The O.S.C. would not permit the proposed take-over bid to proceed through the Toronto Stock Exchange, apparently because Cornat did not intend to circulate information to each Bralorne shareholder as was required under the proposed Part XXIII.[318] The take-over bid was permitted to proceed through the Vancouver Stock Exchange, however, even though it was not in compliance with the Vancouver Stock Exchange's rules for take-over bids. The Cornat bid was to be kept open for 19 days, Bralorne was going to communicate the Cornat offer to each of its shareholders, and the shares were to be

taken up on a pro-rata basis so that there was little danger offeree shareholders would be treated unfairly. The writer surmises that the Vancouver exchange was also happy to steal away any business that it could from Toronto.

The O.S.C. was miffed, however, since it was of the opinion that the stock exchange exemption only applied to stock exchanges recognized by the Commission.[319] In what one commentator[320] described as an "amazing example of bureaucratic and jurisdictional conflict" the O.S.C. imposed an interim cease trade order on Bralorne on the grounds that a non-exempt take-over bid was proceeding that was not in compliance with the statutory take-over bid provisions. They considered the bid to be a deliberate affront and challenge to the Commission but realized the cease trade order would only disadvantage the Ontario shareholders of Bralorne and rescinded the order in time for them to tender their shares on the Vancouver Stock Exchange.[321]

The Vancouver Stock Exchange was clearly a stock exchange within the meaning of the exemption in subsection 81(b)(ii) of the Old O.S.A. and the O.S.C.'s tentative position that it was not was in error.[322] The hapless position of the O.S.C. on this point was illustrated even more clearly in the take-over of Husky Oil Ltd. by Alberta Gas Trunk Line Company Limited, Nova's predecessor, in June

1978.[323] Because of a leak Petro-Canada had to make a premature announcement of its intention to make a formal take-over bid for all the common shares Husky Oil Ltd. The announcement was made on June 10th when Husky's shares were trading in the $30.00 per share range. Husky was hostile to the Petro-Canada bid and it brought Occidental Petroleum Corporation in as a white knight. Within approximately ten days Petro-Canada had increased its cash bid to $52.00 per share and Occidental was offering securities worth about $54.00 per share. It was a war of words, however, because no documents had been mailed to the Husky shareholders. At this stage AGTL began buying Husky shares, primarily on the Amex - the American Stock Exchange,[324] and it announced on June 27th that it had acquired approximately 35 percent of the Husky shares. Petro-Canada and Occidental withdrew and the share price fell from a high of $47.00 back to its pre-bid levels.

The O.S.C. was alarmed at the take-over because professional traders - arbitrageurs - obtained the benefit of the increase in the market price of Husky shares and the other shareholders did not participate to any significant extent.[325] AGTL would not have been able to proceed as it did under the New O.S.A., which had been passed by the legislature by this time but was not yet proclaimed. As a stopgap measure the O.S.C. issued for comment a draft regulation that would prohibit a bid to be made on a stock

exchange where there were security holders resident in Ontario unless the stock exchange adopted, and the offeror complied with, rules substantially similar to those adopted by the Toronto Stock Exchange, Part XXIII.[326] Implicit in this proposed prohibition was the view that an open offer through a stock exchange outside Ontario is made to security holders resident in Ontario, just as it is made to all other security holders.[327] Because of the O.S.C.'s doubts about the legal validity of this view the draft regulation was withdrawn only to be resurrected after the Edper-Brascan take-over, which took place in April 1979, four months before the New O.S.A. became effective.

Brascan Ltd. became a take-over target in December 1978 when it sold its major subsidiary in Brazil and became cash rich.[328] When representatives of Edper Equities Ltd. informed Brascan of their intention of making a take-over bid Brascan immediately took defensive action. On the same day that Edper announced its intention to bid for 50 percent of the Brascan shares, April 9, 1979, Brascan announced its bid for the shares of F.W. Woolworth & Co. Edper withdrew and then sought the O.S.C.'s consent to make an exchange bid for Brascan conditional on the Woolworth's bid being abandoned or having failed. The O.S.C. did not approve and things remained quiet until the end of May when in two days on the Amex Edper purchased 6.3 million shares of Brascan and acquired control.

It was not clear whether the purchases were a take-over bid under the Old O.S.A. Edper was assisted by an investment dealer who contacted some 50 shareholders and if any such shareholder had an Ontario address on Brascan's books the bid would technically have been a take-over bid.[329] In any event, the take-over bid was exempt because the purchases were through the Amex and the unqualified stock exemption was available.

The draft regulation from July 1978 was adopted by the Ontario Cabinet in the week following the Edper-Brascan take-over eliminating the possibility of any further exchange take-over bids where the exchange did not have rules substantially similar to those in Part XXIII of the Toronto Stock Exchange's General By-Law.[330]

2. Part XXIII and the Exemption Under the New Acts

Part XXIII of the Toronto Stock Exchange's General By-Law regulates take-over bids made through the facilities of the T.S.E. in reliance on the exemption in subsection 88(2)(a) of the New O.S.A. from making a formal take-over bid by way of a take-over bid circular. The rules in Part XXIII differentiate between a normal course purchase, a block offer and an offer for control in recognition of the benefits of allowing a certain degree of freedom to trade in the market

for an offeror who would otherwise be caught by the arbitrary 20 percent test in the definition of take-over bid.

(a) Normal Course Purchase

A normal course purchase is a take-over bid, as that term is defined in the New O.S.A., or the C.B.C.A. if the offeree company is incorporated under that statute,[331] where less than five percent of the listed voting securities of the offeree company are acquired in a 30-day period.[332] Thus, the offeror must have either already reached the threshold level or will reach the threshold level by virtue of the acquisition for it to be a normal course purchase. In calculating the five percent all purchases, including a purchase under the private agreement exemption, are to be included, but shares acquired under a block offer, an offer for control or pursuant to a take-over bid circular are not included. A normal course purchase is not a "stock exchange take-over bid" within the meaning of that term in Part XXIII so that the offeror does not have to give any notice of such purchases to either the stock exchange or the offeree shareholders. Accelerated insider trading reports are required, however, when 20 percent is reached and at each additional five percent.[333] Shares do not have to be taken up pro-rata.

The normal course purchase allows those offerors who would otherwise be subject to the take-over bid rules to periodically acquire additional minor holdings on the stock exchange in a simple easy manner. The theory is that because only up to five percent can be acquired in any 30-day period the market forces are not disrupted and the offeree shareholder who wishes to sell into the market will receive a fair price. This is in keeping with the original basis for the stock market purchase exemption.

(b) Block Offers and Offers for Control

Part XXIII imposes quite rigorous rules on block offers and offers for control through the T.S.E. An offer for control is a take-over bid through the T.S.E. where:

(i) the offeror owns less than 50 percent of the outstanding listed voting shares of the offeree company;

(ii) the offer is at an average bid value exceeding the market price by five percent. The average bid value is determined by a complicated formula set out in Part XXIII.[334] It will be somewhere between the market price and the actual bid price

unless the offeror is bidding for all the shares not owned by him in which case it will be the actual bid price; and

(iii) the T.S.E. deems the bid to be an offer for control. The T.S.E. must be consulted prior to any "stock exchange take-over bid", so the offeror will always know whether his bid is deemed to be an offer for control.

A block offer offer is any take-over bid made through the stock exchange that is neither a normal course purchase or an offer for control.

Block offers and offers for control are "stock exchange take-over bids". The rules for a block offer are theoretically less strict than those for an offer for control, but the procedure to be followed in making a block offer is effectively the same as that for an offer for control because of the Toronto Stock Exchange's policy in interpreting Part XXIII.[335] The most significant aspects of the procedure and requirements for these two types of "stock exchange take-over bids" are set out below.

(i) Time for Acceptance

Section 23.06 of Part XXIII sets out the minimum periods that a block offer and an offer for control must remain open, five and ten clear trading days, respectively. Unless the offeror can show that the shorter time period is clearly adequate for the full dissemination of information, however, the T.S.E. will normally require that a block offer remain open for ten clear trading days.[336]

The minimum period of ten clear trading days for which an exchange take-over bid must now remain open is still less than the minimum period of 21 days for a circular bid, but only by seven days because of the two intervening weekends.

Trading in the shares of the offeree company is halted while the offeror makes timely disclosure of the bid. The offeror in an offer for control may request that trading remain halted until the bid has expired, but it is unlikely that the T.S.E. will grant such a request.[337]

(ii) Disclosure of Information

Prior to making a block offer or an offer for control the offeror must discuss the bid with the T.S.E. and

file a notice with the T.S.E. The information required to be obtained in the notice is substantially the same information that is required in a take-over bid circular.[338] The notice must be reviewed and approved by the T.S.E. prior to the bid and the notice must also be filed with the Commission.

Though technically only required to do so in an offer for control,[339] the T.S.E. requires the offeror in all "stock exchange take-over bids" to take steps to inform the registered shareholders of the offeree company of the terms of the bid as soon as the notice of the bid is accepted by the stock exchange. The offeror must both issue a press release and publish a notice in at least one major daily newspaper in each province stating: the names of the companies involved; the number of shares sought; the price per share offered; the time for which the offer will remain open; the name of each stock exchange through which the offer is made; and the suggestion that a broker be contacted for more information. Further, the information that must be published must also be communicated to each offeree shareholder by telephone, telegraph, telex or other means appropriate in the circumstances. This last requirement, while far less onerous than providing a take-over bid circular to each offeree shareholder, is quite a departure from the situation before Part XXIII when the offeror was not

required to make any communication with individual offeree shareholders in a stock exchange take-over bid.

(iii) Other Terms and Conditions

A block offer or an offer for control may not be made for a company while it is currently the subject of a take-over bid made by way of a take-over bid circular.[340] This limits an offeror making a circular bid to market purchases that are either not a take-over bid or are normal course purchases and would have prohibited the Rothmans-Breweries take-over. In addition, during a block offer or an offer for control the offeror may not make any purchases through the stock exchange or by way of private agreement.

Subsection 23.10 of Part XXIII sets out detailed rules to be followed in the event of a competing stock exchange take-over bid. The effect is to permit offerors who have made lower bids to withdraw without obligation if they so desire or to increase the price per share that they are offering. All possibilities are covered so an offeror will know beforehand the procedure to be followed in the event of a competing bid unlike the situation in the Abitibi-Price take-over.

One possibility not covered in Part XXIII is a competing circular bid during the course of an offer for control through the stock exchange. The Toronto Stock Exchange was concerned in their notice of November 7, 1979 about this possibility, particularly that the stock exchange take-over bid might disadvantage a subsequent competitive offeror who wishes to use the circular route.[341] To deal with this concern the T.S.E. requires an offeror in an offer for control to agree that in the event of a competing circular bid he will extend his bid to give the offeree shareholders time to consider the competing bid.[342]

A "stock exchange take-over bid" must be for cash and the only condition permitted is the maximum number of shares that will be taken up. Shares must be taken up pro-rata. Under subsection 23.02(5), however, a bid may be withdrawn if the T.S.E. is satisfied that any undisclosed action prior to the date of the offer or an action subsequent to that date by the board of directors or senior officers of the offeree company or by a person or company other than the offeror effects a material change in the affairs of the offeree company. This is akin to one of the permitted conditions in a circular bid[343] and provides some protection to offerors in stock exchange take-over bids that they did not have before Part XXIII, possibly as compensation for the mandatory minimum period that such bids must now remain open.

One final provision of Part XXIII is worth noting, subsection 23.02(1) which states that if an offeror fails to comply with any provision of Part XXIII the take-over bid shall be deemed not to be made through the facilities of the stock exchange.

(c) Recognition of a Stock Exchange

Unless the stock exchange take-over bid is made through the facilities of a stock exchange recognized by the O.S.C. for that purpose, the exemption in subsection 88(2)(a) of the New O.S.A. does not apply. Ontario Policy No. 3-42 deals with recognition of stock exchanges. The Policy recognizes the Toronto Stock Exchange for the purposes of subsection 88(2)(a) on condition that the offeror discuss any offer for control with the Commission beforehand to verify that the bid is so structured as not to put at a disadvantage any subsequent competitive offer. The Commissions's concern is the same as that in the Toronto Stock Exchange notice of November 7, 1979. The offeror has to agree to extend the stock exchange offer if a competing circular bid is made.

The Policy only recognizes the one exchange but notes that the Alberta, Vancouver and Montreal exchanges have adopted rules similar to Part XXIII and invites those exchanges to initiate discussions with a view towards being recognized by the O.S.C.

(d) Stock Exchange Take-Over Bids in Alberta

Under the New A.S.A. the situation in Alberta is virtually identical to that in Ontario. The wording in subsection 132(1)(a) of the New A.S.A. corresponds very closely with that in subsection 88(2)(a) of the New O.S.A. Section 13.21 of the Alberta Stock Exchange By-Law tracks Part XXIII and Alberta Policy No. 3-13 recognizes the Alberta Stock Exchange for the purposes of subsection 132(1)(a). One difference, however, is that Policy No. 3-13 also recognizes the Toronto Stock Exchange.

(e) Comment

Theoretically the problem of whether a take-over bid is occurring within Alberta or Ontario when an offeror makes a stock exchange take-over bid through the facilities of a foreign exchange such as the Amex still exists. Both Alberta and Ontario have attempted to deal with this problem in their definition of take-over bid. Alberta's definition[344] includes the words ". . . directly or indirectly . . . to a security holder whose latest address . . . is in Alberta". Ontario's approach is more direct because it includes an offer to sell within the definition of take-over bid.[345] While this attempt by the securities commissions to stretch their jurisdiction across provincial and national boundaries may not be valid it is not likely to be challenged in the

context of the stock market purchase exemption. Since the New O.S.A. came into force no offerors have attempted an end run around the O.S.C. as happened in the Cornat-Bralorne, AGTL-Husky and Edper-Brascan take-overs. The new legislation and the exchange by-laws have effectively closed off both these end run take-overs and the quick one shot exchange take-overs such as Rothmans-Canadian Breweries and Abitibi-Price.

One aspect of the present exemption that should be noted is that while the ostensive purpose behind the minimum time period is to allow for dissemination of information to offeree shareholders, a significant side effect is that it permits further competition. This factor, augmented by the requirement that the offeror must agree to extend his stock exchange bid if there is a competing circular bid, has caused offerors to shy away from using the stock exchange take-over route.

It is easy to argue that small unsophisticated shareholders lost out in the AGTL-Husky and Edper-Brascan take-overs, but it is much harder to maintain that such shareholders lost out in the Abitibi-Price take-over when over 95 percent of the shares were tendered. The price offered was attractive and they wanted to sell. The Toronto Stock Exchange was developing some expertise in handling exchange take-overs.[346] The Part XXIII rules that the

O.S.C. wanted may be an over-reaction because all that really seemed to be required after Abitibi-Price was a minimum bid period of five clear trading days (so that one weekend gets included), some rules to deal with competing bids, and wording like that in the present legislation to discourage the use of out-of-province exchanges.

CHAPTER VI

CONCLUSION

> "Just as a ten-mile-per-hour speed limit on our highways would save lives but at an unacceptable cost in loss of commerce, so requirements that seem ideal from the standpoint of investor protection may detract from the effective operation of the securities industry. To avoid such an impact and consequent prejudice to the national economy, it may be necessary from time to time to modify or even abandon a proposed requirement which might otherwise seem desirable for investor protection."[347]

The securities regulation of take-over bids in Ontario and Alberta has come a long way over the past 15 years. The new generation of securities acts have much more sophisticated and comprehensive provisions to cover take-over bids than did the initial legislation in 1967. We have traced the practical reasons and policy decisions behind this increasing sophistication and comprehensiveness in the legislation. In doing so it is very easy to lose sight of the forest for the trees. The purpose behind the take-over bid provisions is to provide protection to offeree shareholders by ensuring they are treated fairly and equally. Each and every change in the legislation can be justified on that basis. Offeree shareholders have been provided with a great deal of protection. We must ask ourselves, however, what the price of this protection is? Why is it that vendors

of other types of property are not similarly protected? Do we want our government to assume the role it has?

A. The cost of protection provided to offeree shareholders has two components. One component is very obvious, that part of the cost of staffing and running the securities commission that can be attributed to the regulation of take-over bids. With the discretionary powers that securities commissions now have the need for commission hearings, rulings and orders have increased in their number and importance from 15 years ago. Another aspect of this cost is that commissions may be devoting a disproportionate amount of their limited resources to the regulation of take-over bids.

While the actual cost and opportunity cost of regulating take-over bids may be substantial, what the writer is more concerned about is the cost to the economy both in complying with the legislation and in not making take-over bids because of the cost of compliance.

A dramatic example of the former can occur because of the follow-up offer obligation. An entrepreneur may only be able to acquire control of one company instead of several because the follow-up obligation may exhaust his financial resources. Without the obligation he might be able to revitalize several different companies. Less dramatic is the

cost to businessmen of hiring legal and accounting experts to comply with all the take-over bid provisions, provisions which businessmen 20 years ago did not have to contend with. It is simple and cheap for governments to introduce and expand upon regulatory schemes. No government expenditure may be required, but every such scheme is just as real a cost to business and the economy as an increase in taxes.

The cost to the economy of take-over bids that are not made can be just as subtle. Whenever potential offerors shy away from a potential take-over because of the disclosure that is required, or the cost of complying with the take-over bid legislation, the economy may be detrimentally affected. This is because, theoretically at least, a free enterprise economy is the most efficient form of economy because it encourages transfers of control to more efficient managers. It can only work when each participant is free to pursue his own economic advantage. The take-over bid legislation we presently have is a dramatic interference with that freedom.

The writer is not suggesting that we do away with take-over bid legislation, but only that its true costs be considered. This may well result in modifications to the provisions.

B. Normally a person's biggest investment will be in

his home or farm. If a developer or government is assembling land around this home or farm for future development there is no requirement that it disclose its intentions to any of the owners, pay them all the same price or buy all the property in the area. If that owner has even a small stake in a public company, however, there are elaborate rules to ensure he is treated fairly in the event of a take-over bid.

It is not easy to explain this discrepancy. The conventional wisdom is that it is essential to maintain the public's confidence in the securities market because of the tremendous capital requirements of this resource rich but relatively undeveloped country. This is certainly true to some extent, but it may also be true that this slogan has been used by the bureaucrats in securities commissions to increase their power unnecessarily. They view progress, insofar as take-over bids are concerned, as more and more regulation and discretionary power to protect the investor and maintain his confidence in the securities market. One begins to question whether these widows and orphans really do exist[348] and, if they do exist, whether it is necessary to have so many provisions to protect their interests in order to have a healthy securities market.

C. How one views the explosion in government regulation exemplified by the securities regulation of

take-over bids, and evident in many other areas, depends on where one is situated in the political spectrum.

If you view government as a barely tolerable but necessary evil the present day take-over bid provisions in Ontario and Alberta are an anathema. They represent an incredible intervention into the freedom to contract and the free market economy. Further, they look like they are just part of a trend, that the level of intervention will continue to increase. The public good that is supposed to be effected by this intervention is not clear and, even if it were, its cost, not in terms of loss of individual freedom but strictly on an economic plane, is far greater than its benefit.

If, on the other hand, you view government as a surrogate parent that must provide for your physical, mental and financial well being from the cradle to the grave the present take-over bid provisions are a welcome trend, a harbinger of better things to come. Their development was a very necessary reform, a counter-balance against the power and ruthlessness of the faceless corporate entities that run our economy. Big business has no ethics and it has had its own way too long. The take-over bid provisions are just one of many bulwarks that government must throw-up and continue to strengthen to protect innocent citizens.

The writer tends toward the former view. In my opinion the securities regulators have been over zealous both in advocating and counselling the enactment of various take-over bid provisions and in their administration of such provisions. The writer suggests that the total effect of the present regulatory regime must be considered rather than the effect of each provision individually. When this is done it is apparent to the writer that there is too much protection for offeree shareholders at the expense of the free enterprise system and that this is symptomatic of much of government regulation.

It is interesting to note that in another important area of securities legislation, the provisions governing prospectuses, the trend in both Canada and the United States is towards simplifying procedures, at least for smaller companies.

Whatever one's views are, the securities regulation of take-over bids is bound to continue to be an interesting and controversial area, and one with which lawyers will become increasingly involved.

FOOTNOTES

1. "The O.S.C. has Been a Leader of the Enterprise System", Financial Post, Oct. 10, 1981.

2. D. Johnston, Canadian Securities Regulation (1977) 318.

3. Report of the Attorney General's Committee on Securities Legislation in Ontario (1965) (hereinafter the "Kimber Report") 3.14; Johnston, supra n.2 at 319; P. Anisman, Takeover Bid Legislation in Canada: Preliminary Proposals for Reform LL.M. Thesis, University of California, Berkeley (1970) 6 and 22.

4. See: Canada Business Corporations Act, S.C. 1974-75, c. 33 (hereinafter "C.B.C.A."), sec. 177 and subsecs. 183(3)-(7); The Business Corporations Act, S.A. 1981, c. B-15 (hereinafter "A.B.C.A."), subsecs. 177(6) and 183(6).

5. P. Davies, The Regulation of Take-Overs and Mergers (1976) 23; see Ridge Nominees v. I.R.C. [1962] CH 377 at 383.

6. See: C.B.C.A., sec. 199; A.B.C.A., sec. 187-199. See generally: D. McNamara, "Note on Compulsory Acquisition of Shares" (1971) 10 U.W.O.L. Rev. 141; Hansen, "Compulsory 90/10 Acquisitions under the Alberta Companies Act" Legal Education Society of Alberta, Advance Corporate Law (1977).

7. See: C.B.C.A., subsec. 2(1); A.B.C.A., subsec. 2(1). The two-thirds requirement could be altered by the corporation's constating documents, or, less likely in a public company, by a unanimous shareholders agreement.

8. M. Wienberg, Take-Overs and Amalgamations (1963) 9.

9. Id. at 179.

10. Id. at 7; see also: Anisman, supra n.3 at note# 40; Proser, Economic Analysis of Law (1977) 9 and 304; Kimber Report, 3.03.

11. Wienberg, supra n.8 at 7.

12. Johnston, supra n.2 at 320.

13. J. Baille, "The Protection of the Investor in Ontario" (1965) 8 Can. Pub. Admin. 172-268, 325 - 432 at 430; M. Wienberg, supra n.8 at 5.

14. Anisman, supra n.3 at 2; J. Williamson, Securities Regulation in Canada (1960) in Supplement (1966) at 375; G. Creber, "Take-over Bids, Insider Trading and Proxy Requirements" 1968 LSUC Lectures 235 at 245.

15. Johnston, supra n.2 at 321.

16. Creber, supra n.14 at 245; Williamson, Supplement supra n.14 at 375.

17. Williamson, Supplement supra n.14 at 380. But see J. Bennett, Some Aspects of the Legal Control of Take-over Bids: A Comparative Study of English and British Columbia Law LL.M. Thesis, University of British Columbia (1970).

18. Williamson, Supplement supra n.14 at 382; Kimber Report, 3.05 particularly note# 2 at 21.

19. Id.

20. Johnston, supra n.2 at 318.

21. Johnston, supra n.2 at 15.

22. Baille, supra n.13 at 207.

23. Porter Report, 351-52.

24. Kimber Report, Part III. See generally: Anisman, supra n.3; D. Prentice, "Takeover Bids: Part IX of the Ontario Securities Act 1966" (1971) 19 AM.J. Comp.L. 325.

25. Johnston, supra n.2 at 16.

26. Anisman, supra n.3 at 3; Johnston, supra n.2 at 16.

27. S.A. 1967, c. 76.

28. Kimber Report, 3.01 and 3.02.

29. Old O.S.A. subsecs. 80(e) and 80(f), respectively.

30. Kimber Report, 3.09; The cut-off under the present City Code is now 30 percent, M. Wienberg and M. Blank, Take-overs and Mergers (4th ed. 1979) 656.

31. This was the proposed Williams Act which became effective in July 1968, Public Law 90-439, 90th Cong., S. 510, July 29, 1968 (82 Stat. 454). The Williams Act added subsecs. 13(d) and 14(d) to the Securities and Exchange Act of 1934. It was amended in 1970 to require disclosure of any owner of more than five percent and to include stock tender offers.

32. Johnston, supra n.2 at 323.

33. See generally: R. Falby, "Take-over Bids and the Ontario Securities Act of 1966" (1967) 5 Osgoode Hall L.J. 227 at 229; Anisman, supra n.3 at 14; Prentice, supra n.24 at 331; Report of the Committee of the Ontario Securities Commission on the Problems of Disclosure Raised for Investors by Business Combinations and Private Placements (1970) (hereinafter the "Merger Report") 7.05-7.10.

34. Prentice, supra n.24 at 333; Johnston, supra n.2 at 148.

35. Kimber Report, 3.12.

36. Johnston, supra n.2 at 326.

37. E. McRory, "Take-Over Bids pursuant to Part 9 of the Securities Act of Alberta and Collateral Matters" Legal Education Society of Alberta, Advance Corporate Law (1977) at 12.

38. Prentice, supra n.24 at 334; Johnston, supra n.2 at 319.

39. Kimber Report, 3.14.

40. The time for acceptance rules are found in sec. 81 of the Old O.S.A.

41. Old O.S.A., sec. 82.

42. Johnston, supra n.2 at 331.

43. Falby, supra n.33 at 232; see for example the situation in Boardman v. Phips [1967] 2 A.C. 46 at 51-53.

44. Merger Report, 7.25; see Johnston, supra n.2 at 333 note# 72.

45. See n.6 supra. Raithie v. Montreal Trust [1953] 2 S.C.R. 204 and the judicial policy of construing statutes allowing expropriation strictly required that the offer remain open for four months. Gregory v. Canadian Allied Property Investments Ltd. [1979] 3 W.W.R. 609 (B.C.C.A.), affg. 78 D.L.R. (3d) 132 is apparent authority for the view that under C.B.C.A. sec. 199, and other legislation modelled on this section, it is no longer necessary for the take-over offer to remain open for four months. See: S. Halperin, "Statutory Elimination of Minority Shareholders in Canada", L. Sarna, ed. Corporate Structure, Finance and Operations (1980) 1 at 28.

46. Old O.S.A., subsec. 81(7).

47. Prentice, supra n.24 at 336.

48. Old O.S.A., subsec. 83(2); see generally: Falby, supra n.33 at 235; Prentice, supra n.24 at 340.

49. Old O.S.A., subsec. 85(1) and sec. 82.

50. Id., subsec. 85(3).

51. Id., subsec. 86.

52. Id., subsec. 88.

53. Id., subsec. 87.

54. Id., sec. 90.

55. Id., subsec. 94(1)1.

56. Kimber Report, 3.18.

57. Falby, supra n.33 at 239; E. Schmuts and E. Kelly, "Disclosure in Connection with Cash Take-over Bids: The New Regulations" (1968) 24 Buss. Law 19 at 21.

58. Wienberg, supra n.8 at 167.

59. For example Brascan's aborted bid for F.W. Woolworth & Co. in 1979 which was prompted, in part, by a desire to get control of Woolworth's real estate holdings which were carried on the books at a fraction of their true value: P. Newman, 2 The Canadian Establishment (1981) at 222.

60. Kimber Report, 3.24.

61. Id.

62. Ontario Regulation 101/67, sec. 56.

63. Ontario Regulation 223/68, sec. 7.

64. Johnston, supra n.2 at 338; see Old O.S.A., sec. 142.

65. Johnston, supra n.2 at 338; Kimber Report, 3.13.

66. Falby, supra n.33 at 236.

67. Kimber Report, 3.13.

68. Id., 3.21.

69. Id., 3.03.

70. The Corporations Act, R.S.O. 1970, c. 89 sec. 337. This section provides that a shareholder's list could be obtained by anyone on application and ten days notice. See C.B.C.A. and A.B.C.A., sec. 21.

71. Old O.S.A., sec. 86.

72. Id., sec. 95.

73. Id., subsec. 81(7).

74. Prentice, supra n.24 at 340.

75. Old O.S.A., subsec. 83(1).

76. See for example the recent Ontario Securities Commission hearing to determine whether Genstar's $31.00 bid for Canada Permanent's shares had expired before they purchased First City's holdings in Canada Permanent for $35.00 a share: "Takeover Hearing Tries to Get Back on Track" Financial Post, Jan. 30, 1982. The C.B.C.A. defines a take-over bid as an offer made to shareholders "at approximately the same time": C.B.C.A., sec. 187.

77. Falby, supra n.33 at 234.

78. Prentice, supra n.24 at 359 lists several possible common law remedies, but they appear speculative:

    (i) an action for fraud;

    (ii) an action for damages for breach of statutory duty;

    (iii) a defence to an action to enforce a contract for the sale of shares where offer did not contain the required terms; and

    (iv) recission.

79. [1964] A.C. 465 (H.L.).

80. Merger Report, supra n.33.

81. "Disclosure to Investors: A Reappraisal of Administrative Policies under the '33 and '34 Securities Act, Report of the Disclosure Policy Study to the Securities and Exchange Commission" (1969). One critical reviewer of the Merger Report called it the "Chaff Report": W. Grover, "Book Review" 23 Admin. L. Rev. 309.

82. The Securities Act, 1978, S.O. 1978, c. 47 (hereinafter the "New O.S.A."); The Securities Act, 1981, S.A. 1981, c. S-6.1 (hereinafter the "New A.S.A.").

83. H. Emerson, "An Intergrated Disclosure System for Ontario Securities Legislation", J. Ziegel, ed. 2 <u>Studies in Canadian Company Law</u> (1973) 400 at 437.

84. S.O. 1971, c. 31, secs. 22 to 32. The Alberta legislation was amended in a similar fashion by S.A. 1972, c. 85, secs. 27 to 37.

85. Merger Report, 7.36.

86. Id. at 7.12.

87. Old O.S.A., sec. 110.

88. Merger Report, 7.22.

89. This requirement was set out in section 52 of the Old O.S.A. It required the chief executive officer, the chief financial officer and any two directors of the

issuing company other than the foregoing to sign a certificate that the prospectus constituted full, true and plain disclosure as required by the Act and regulations. This certificate was included in the prospectus.

90. See Old O.S.A., sec. 64 for the statutory right of recision for prospectuses on which this recommendation is based.

91. See Old O.S.A., sec. 141 for the civil liability of directors for misleading statements in a prospectus and the statutory defences available.

92. It is not clear what the Merger Committee meant because no corporate statutes in Canada allow the minority to force the company to purchase their shares simply as the result of a take-over bid. (Note that the definition of "take-over bid" in the Old O.S.A. did not include a bid by a company for its own shares). If the offeror wishes to purchase the minority's shares under a statute allowing compulsory acquisition, however, the minority are entitled to dissent (sec. 136, Canada Corporations Act, R.S.C. 1970 c. C-32) and modern statutes explicitly allow them to demand fair value for their shares which may well result in a court ordered appraisal (sec. 199, C.B.C.A.). See F. Iacobucci, M. Pilkington and J. Prichard, Canada Business Corporations (1977) at 465 for a further discussion of this matter.

93. This statement of intention is not binding on the offeror and is usually phrased so as to disclaim even the suggestion that it might be binding. See the provision in Kaiser Resource Ltd.'s bid for Ashland Oil reproduced in S. Lovecchio, "How to Takeover, How to Squeeze, How to Block and Tackle" at 27, Legal Education Society of Alberta, Securities Law and Practice in Alberta (1979).

94. Merger Report, 7.34.

95. See n.84, supra. The Securities Amendment Act, 1971. S.O. 1971 c.31, secs. 22 to 32. It should be pointed out that the numbering in the Old O.S.A. was changed in the revised statutes of 1970 so that all the sections in Part IX moved forward one number, section 80 becoming section 81 and section 81 becoming section 82, ad seriatim.

96. Old O.S.A., sec. 141.

97. See An Act to Amend the Canada Corporations Act, R.S.C. 1970 (1st Supp.), c.10, S.24 which added sections 135.1 to 135.93.

98. Dickerson, Howard and Getz, Proposals for a New Business Corporations Law for Canada (1971) (hereinafter the "Dickerson Report"), Part 16:00.

99. C.B.C.A., supra n.4.

100. Dickerson Report, 141.

101. Canada Corporations Act, R.S.C. 1970, c. C-32, as amended by c. 10 (1st Supp.) sec. 135.1; C.B.C.A, sec. 187.

102. Dickerson Report, 141.

103. C.B.C.A., sec. 198.

104. Id.

105. Dickerson Report, 146.

106. J. Langford and D. Johnson, "The Case for a National Securities Commission", 1968 U. of T. Commerce Journal 21.

107. The courts have taken a liberal interpretation of where the activity is occurring. In Gregory & Co. v. The Quebec Securities Commission [1961] S.C.R. 584, 28 D.L.R. (2d) 721, the Supreme Court found that trading securities in Quebec for clients outside Quebec and mailing a bulletin it wrote to clients outside the province constituted trading in securities and acting as investment counsel within the meaning of the Quebec legislation so as to give the Q.S.C. jurisdiction. In R. v. McKenzie Securities Ltd. et al (1966) 55 W.W.R. 157, 56 D.L.R. (2d) 56 (Man. C.A.) the court found that telephone and mail solicitations originating in Toronto but received by a Manitoba resident constituted trading in securities in Manitoba.

108. Johnston, supra n.2 at 324. See the definition of take-over bid in the Old O.S.A., sec. 80(g) which refers to an offer made to shareholders "the last address of any of whom as shown on the books of the offeree is in Ontario ...".

109. Johnston, supra n.2 at 324.

110. Old O.S.A., sec. 80(g).

111. Old O.S.A., sec. 81(b)(i): "... by way of agreement with fewer than 15 shareholders and not made to shareholders generally".

112. Johnston, supra n.2 at 325.

113. [1972] S.C.R. 119 at 126.

114. Johnston, supra n.2 at 325.

115. [1932] A.C. 318 (P.C.), on appeal from the Alberta Supreme Court, Appelate Division.

116. S.A. 1930, c. 8.

117. (1978) 19 O.R. (2d) 516 (O.C.A.); affg. (1977) 2 B.L.R. 129 (Ont. Div. Ct.); rev'd (1975) 65 D.L.R. (3d) 577 (Ont. H.C.). The case was appealed to the Supreme Court of Canada, but they have not yet handed down a judgment.

118. (1975) 65 D.L.R. (3d) 577 at 582.

119. Ontario Business Corporations Act, R.S.O. 1970, c. 53.

120. Old O.S.A., sec. 101(a)(iii).

121. Business Corporations Act, R.S.O. 1980 c. 54.

122. Business Corporations Act, S.A. 1981 c. B-15, sec. 121.

123. S.A. 1981, c. S-6.1, Part 14.

124. The narrow issue in the hearing was whether the directors' circular sent by Royal Trustco's directors on September 5, 1980 made sufficient disclosure to allow Royal Trustco's shareholders to make a proper decision on the disposition of the their holdings in light of the alleged scheme by the chairman and president to get sufficient shares into friendly hands to defeat the bid. The Commission claimed that the chairman and president were comfortable that the bid would be defeated, even in the early stages, and this should have been disclosed so Royal Trustco's shareholders could decide whether to sell their stock on the market before the bid expired and the market

price dropped. See: "O.S.C. Hearing a Venture into Unknown Territory", Financial Post, January 24, 1981, 4.

125. See: "O.S.C. Postpones Penalties on Royal Trustco Pair", Globe and Mail, October 23, 1981, B9; "Proper Take-Over Defense Still Unclear", Financial Post, October 24, 1981, 4.

126. "Ottawa Seeks Funds for Royal Trustco Investors", Globe and Mail, March 26, 1982, Bl.

127. Id.

128. See the lists of take-overs in Alboini, infra n.146 at 627 and Newman, supra n.59 in appendix entitled "The Takeovers Record, 1975-1981". See also "Takeover Fever "I", "II" and "III"" in Richardson Securities of Canada "Canadian Research Report" Jan. 1979, Aug. 1979 and May 1980, respectively.

129. New O.S.A. and New A.S.A., see supra n.82. The provisions implementing the closed system in Ontario only became effective on March 15, 1981 so as to allow an 18 month transition period.

130. Ontario Legislative Assembly Select Committee on Company Law, Report on Mergers, Amalgamations and Certain Related Matters (1973) (hereinafter the "Hodgson Report").

131. Hodgson Report, Ch. 11.

132. Id., Ch. 12.

133. The City Code, Rule 27. The City Code is reproduced in appendix A of Wienberg and Blank, supra n.30.

134. Hodgson Report, Ch. 13.

135. Id., Ch. 15.

136. Merger Report, 7.25.

137. Hodgson Report, Ch. 14.

138. supra n.133.

139. [1973] 2 W.W.R. 385 (B.C.S.C.).

140. Id. at 429.

141. Id. at 414.

142. See: C.B.C.A., subsec. 117(1); O.B.C.A., sec. 144; A.B.C.A., subsec. 117(1).

143. This would not have helped Teck Corporation as the contract was not entered into during the course of a "take-over bid".

144. Hodgson Report, Ch. 15.

145. Id., Ch. 22.

146. For a detailed and comprehensive review and analysis of the take-over bid provisions in the New O.S.A. see Part XIX of the excellent book by V. Alboini, Ontario Securities Law (1980).

147. Lovecchio, supra n.93 at 10.

148. The O.S.C. concern is elaborated upon in the staff memorandum to the O.S.C.: C. Salter, "Going Private: Issuer Bids - Insider Bids - Squeeze-Outs", May 17, 1978. See generally: Alboini, supra n.146 at pp. 633 to 643; and Ontario Policy No. 3-37.

149. Ontario Policy 3-42 "Recognition of Stock Exchanges".

150. Toronto Stock Exchange General By-law, Part XXIII "Stock Exchange Take-over Bids".

151. Ontario Regulation 478/79 as amended (hereinafter the "Regulations"), subsec. 162(3), allows for a 15 percent premium above the "closing price", but only applies in determining whether the follow-up offer obligation is triggered.

152. Alboini, supra n.146 at 689.

153. New O.S.A., sec. 103. The similar provision in the Old O.S.A. is found in sec. 110a.

154. Alboini, supra n.146 at 691.

155. See the list of possible exemptions in Alboini, supra n.146 at 748.

156. Id. at 695.

157. Id. at 693.

158. Id.

159. New O.S.A., subsec. 89(1)12.(c).

160. Id., subsec. 89(1)14.

161. New O.S.A., sec. 100.

162. New O.S.A., subsecs. 96(1) and 96(2).

163. New O.S.A., subsecs. 96(4) and 96(5).

164. Regulations, sec. 163(2).

165. Material change is defined in the New O.S.A., subsec. 1(1)21.

166. Regulations, Form 31, item 11.

167. Material fact is defined in the New O.S.A., subsec. 1(1)22.

168. New O.S.A., subsec. 127(1).

169. Regulations, Form 32, item 5.

170. New O.S.A., Part XX.

171. Liability for improper insider trading is set out in sections 75 and 131 of the New O.S.A.

172. New O.S.A., subsec. 89(1)12.(b) and (c).

173. Old O.S.A., subsec. 82.10.

174. New O.S.A., subsec. 89(1)12.(b); Alboini, supra n.146 at 646.

175. Alboini, supra n.146 at 646.

176. New O.S.A., subsec. 90(2).

177. Old O.S.A., subsec. 82.3.

178. P. Crawford, "Takeovers of Public Corporations" Mid-Winter Meeting of the Alberta Branch of the C.B.A. M85 at M181.

179. Id.

180. Id. at M184.

181. Old O.S.A., subsec. 84(1).

182. Alboini, supra n.146 at 732.

183. O.S.C. weekly bulletin, April 24, 1981 at p. 24E.

184. Crawford, supra n.178 at M177.

185. Id. at M176.

186. Id. at M177.

187. "Notice re: Take-over Bids" O.S.C. Weekly Bulletin, July 17, 1981 at p. 194.

188. Alboini, supra n.146 at 802 and 809. A good example is A.G.T.L.'s stock exchange take-over bid of Husky on the Amex.

189. Alboini, supra n.146 at 802.

190. Old O.S.A., secs. 100a and 144a.

191. Misrepresentation is defined broadly in subsection 1(1)24.

192. O.S.C. Weekly Bulletin, Nov. 13, 1981 at p. 80A.

193. New A.S.A., subsec. 131(j).

194. New O.S.A., subsecs. 90(1) and 90(1a)

195. New A.S.A., subsec. 134(4).

196. New A.S.A., sec. 144.

197. New A.S.A., sec. 147.

198. Old O.S.A., subsec. 80(b)(i).

199. Anisman, supra n.3 at 15.

200. Kimber Report, 3.12.

201. "Minority Stockholders Coming Out Losers in Canadian Mergers and Take-Overs", Globe and Mail, Feb. 19, 1969, B3.

202. At least at this time. Canadian Breweries became the subject of a heated take-over battle in May and June of 1969 about which more will be said in dealing with the evolution of the stock market purchase exemption.

203. "Minority Stockholders", supra n.201.

204. Williams Act, supra n.31.

205. American Bar Association, "Take-Over Bids" (1971) 27 Bus. Law 243 at 247.

206. Johnston, supra n.2 at 340.

207. Merger Report, 7.04.

208. Id., 7.08.

209. Id., 7.09.

210. Id.

211. Farnham v. Fingold (1972) 29 D.L.R. (3d) 279 (O.H.C.), rev'd on other grounds (1973) 33 D.L.R. (3d) 156.

212. See New O.S.A., Part XX and sec. 131.

213. supra n.211.

214. Percival v. Wright [1902] 2 CH. 421.

215. Alboini, supra n.146 at 719. See generally: Wienberg and Blank, supra n.30 at 2531; T. Schiff, "Sale of Control: The Equal Opportunity and Forseable Harm Theories under Rule 10b-5" (1977) 32 Bus. Law 507 at 508.

216. (1955) 219 F. 2d 173 (2d Cir.).

217. See, for example, the discussion in Comment, "Sales of Corporate Control and the Theory of Overkill" (1964) 31 U. of Chi. L. Rev. 725 at 728.

218. R. Jennings, "Trading in Corporate Control" (1956) 44 Cal. L. Rev. 1 at 4.

219. The court of appeals remanded the case to the district court to determine what this premium was.

220. See the discussion in W. Andrews "The Stockholder's Right to Equal Opportunity in the Sale of Shares" (1965) 78 Harv. L. Rev. 505 at 509.

221. J. Letts, "Sales of Control Stock and the Rights of Minority Shareholders" (1971) 26 Bus. Law Rev. 631 at 635.

222. For example: Jennings, supra n.218; N. Leech "Transactions in Corporate Control" (1956) 104 U. of Penn. L. Rev. 725. Others are listed in Letts, supra n.221 at 635.

223. Letts, supra n.221 at 635.

224. Andrews, supra n.220.

225. G. Javaras, "Equal Opportunity in the Sale of Controlling Shares: A Reply to Professor Andrews" (1965) 32 U. of Chi. L. Rev. 420 at 425.

226. Id. at 426.

227. In the C.B.C.A., for example: Sec. 184 provides an appraisal right to dissenting shareholders in the case of certain "fundamental changes"; sec. 232 provides for derivative actions where the corporation has been wronged by its controllers; and sec. 234 gives the court broad discretion where the rights of minority shareholders are dealt with oppressively or in a manner that is unfairly prejudicial or that unfairly disregards their interests.

228. For a contrary view see D. Bayne, "The Sale-of-Control Premium: The Intrinsic Illegitimacy" (1968) 47 Tex. L. Rev. 215.

229. Letts, supra n.221 at 645.

230. Hodgson Report, supra n. 130.

231. Id. at 29.

232. Id. at 30.

233. D. Thompson, "Changes in Take-Over Bid Regulation in Ontario", in L.E.S.A., Advance Corporate Law, supra n.37 at 9.

234. Id. at 11.

235. Hodgson Report, 31.

236. Id.

237. Id. at 32.

238. Id.

239. Bill 154, The Securities Act, 1972 (2nd Sess.), 29th Legislature, Ontario; Bill 75, The Securities Act, 1974 (4th Sess.), 29th Legislature, Ontario; Bill 98, The Securities Act, 1975 (5th Sess.) 29th Legislature, Ontario.

240. Bill 20, The Securities Act, 1977 (4th Sess.) 30th Legislature, Ontario.

241. Bill 20, supra n.240, subsec. 90(2).

242. Johnston, supra n.2 at 330.

243. Id.

244. Bill 30, The Securities Act, 1977 (1st Sess.), 31st Legislature, Ontario.

245. Administration of Justice Committee. See: "O.S.C. Works-But System is Criticized", Financial Post, May 1, 1982, 21.

246. Bill 72, The Securities Act, 1980 (4th Sess.), 31st Legislature, Manitoba.

247. O.S.C. Weekly Bulletin, Nov. 13, 1981 at p. 80A.

248. Ontario Hansard, Oct. 30, 1981, J-234.

249. Id. at J-235; Crawford, supra n.178 at M152.

250. New O.S.A., subsec. 91(2) provides an exception.

251. "Inside the Markets". Financial Post, Dec. 5, 1981. See "Ontario Adds Bonus in Offer to 700 Holders of Private Suncor Stock" and "Suncor shares sought by O.E.C.". Globe and Mail, Feb. 20, 1982.

252. "In the Matter of Section 99(b) of the Securities Act, 1978 and in the Matter of British Columbia Forest Products Limited, Noranda Mine Limited and A.E.C. Limited". O.S.C. Bulletin, June 19, 1981, 116C.

253. Id. at 120C.

254. "Interim Report of the Committee to Review the Provisions of the Act Regulating Take-Over Bids", O.S.C. Bulletin, Nov. 27, 1981, 212A at 218A. Grossman's statement is found in the O.S.C. Weekly Summary, Aug. 11, 1978, Supp. X at 4.

255. There is some suggested that the controversy over the follow-up offer obligation abated when the then chairman of the O.S.C., James Baille, assured the securities bar that the exemptions would be interpreted liberally. Baille's successor Knowles has given the exemptions a somewhat more restrictive interpretation: Remark by Purdy Crawford at the Mid-Winter Meeting of the Alberta Branch of the C.B.A. (1982).

256. Re McLaughlin and S.B. McLaughlin Associates Ltd. (1981) 1 O.S.C.B. 98c, 14 B.L.R. 46 (O.S.C.); (1981) 2 O.S.C.B. 385C (Ont. Div. Ct.).

257. It is certainly possible to interpret subsec. 99(a) this way. It says ". . . the offeror will not or did not acquire through the offer the power or authority to control the business or affairs of the offeree company". McLaughlin already had this power or authority to control and the further purchase did not change the situation.

258. Baille, a former chairman of the O.S.C., made the interesting comment that the reluctance of the legislature, cabinet and the courts to review the decisions of securities commissions - because of the combination of judicial and policy-making elements in the Commission's decisions - has had the anomalous result that the provincial securities commissions, in a system of responsible government, are actually more free of review than is the S.E.C., an independent regulatory agency: J. Baille, "Securities Regulation in the Seventies", J. Ziegel, ed. 2 Studies in Canadian Company Law (1973) 343 at 353.

259. "Interim Report" supra n.254 at 225A.

260. Id. at 225A and 226A.

261. Dome Energy Limited obtained an exemption under subsec. 99(e) from making a follow-up offer to the minority shareholders of Hudson's Bay Oil and Gas Company Limited by providing equivalent consideration under a plan of arrangement pursuant to the C.B.C.A. O.S.C. order dated Sept. 16, 1981 and amended Nov. 27, 1981.

262. For an excellent discussion on this point see Crawford, supra n.178 at M140.

263. "Court to Decide on O.S.C. jurisdiction in Bankeno Deal", Globe and Mail, Feb. 18, 1982 at B1.

264. Id.

265. See "Turbo's Deal: A Great Escape", Financial Post, Feb. 6, 1982 at 3 for particulars.

266. "O.S.C. Hearing Set on Value of Merland Offer", Globe and Mail, Feb. 3, 1982 at B1.

267. Id.

268. "Alberta Residents Won't be Ignored, Turbo Head Claims", Calgary Herald, Feb. 24, 1982.

269. "O.S.C. Decides Bankeno Offer Worth Too Little", Globe and Mail, Feb. 20, 1982 at B1.

270. "O.S.C. Orders Bankeno to Extend its Bid for Merland to March 1", Globe and Mail, Feb. 23, 1982.

271. "Turbo Ordered to Keep Commitment to Merland", Globe and Mail, Mar. 17, 1982 at B1.

272. They were warned by the O.S.C. and hostile minority shareholders in Merland that if they did tender they would loose out on any sweeteners that the O.S.C. or the Supreme Court of Ontario might force Turbo to add to its offer. See: "Albertans may be left in the Cold", Calgary Herald Feb. 23, 1982 and id.

273. "Turbo Seeks Rescheduling of its Debt", Globe and Mail, Mar. 17, 1982 at B1; "Turbo Works on Refinancing", Financial Post, Apr. 3, 1982.

274. "Merland Board Opinion of Bid Prohibited", Globe and Mail, Mar. 13, 1982 at B18.

275. P. Bloomfield, "Minorities Have to Speak up for Themselves", Financial Post, Mar. 20, 1982 at 29.

276. "Turbo Spurns O.S.C., but Wins an Extension", Financial Post, Feb. 27, 1982 at 35.

277. Crawford, supra n.178 at M151. Indeed, it would appear that the sole purpose of defining "uniform act province" in subsection 88(1)(l) of the New O.S.A. is to extend the offeror's obligation to make a follow-up offer to security holders whose last registered address is a uniform act province: Alboini, supra n.146 at 662.

278. "Universal, Petrol Clash With O.S.C. Over Merger Premium", Globe and Mail, Nov. 6, 1981 at B8.

279. Id.; Crawford, supra n.178 at M153.

280. See the discussion in Crawford, supra n.178 at 155.

281. "Interim Report", supra n.254 at 237A.

282. Royal Bank of Canada v. The King [1913] A.C. 283 (P.C.) at 298.

283. See the discussion in P. Hogg, Constitutional Law of Canada (1977) at 209 for a criticism of the "watertight" view of provincial boundaries.

284. "Interim Report", supra n.254.

285. Perlman v. Feldmann, supra n.216.

286. Farnham v. Fingold, supra n.211.

287. Id. at 233A; P.C.L. recently requested the O.S.C. to rule whether such a payment by them to the minority shareholders of Sklar would satisfy their follow-up offer obligation.

288. See "Commission is Appreciated by Most", Financial Post, May 1, 1982 at 21.

289. New O.S.A., subsec. 88(2)(a); New A.S.A., subsec 132(1)(a).

290. Johnston, supra n.2 at 326.

291. Alboini, supra n.146 at 663.

292. "Philip Morris Loses Bid for Breweries", Globe and Mail, June 12, 1969.

293. "Formal Offer in Mail for Breweries Shares", Globe and Mail, May 21, 1969, Bl.

294. "Rothmans Rejects Philip Morris Bid for its Breweries Shares", Globe and Mail, May 24, 1969, Bl.

295. "816,628 Shares Traded in Canadian Breweries", Globe and Mail, May 29, 1969, Bl.

296. "Breweries Offer Raised to $15.00 by Philip Morris", Globe and Mail, May 30, 1969, Bl.

297. Id. and "Dominion Securities Withdraws From Buying for Philip Morris", Globe and Mail, May 31, 1969, Bl.

298. Globe and Mail, June 6, 1969, B1.

299. "Canadian Breweries Suffers Price Slump", Globe and Mail, June 7, 1969; "6 Million Shares in Breweries Ready for Mail Back to Owners", Globe and Mail, June 13, 1969.

300. "Rothmans' 116 Million Winds Fight to Control Canadian Breweries", Globe and Mail, June 9, 1969, 1.

301. "Philip Morris Loses Bid for Breweries", Globe and Mail, June 12, 1969.

302. Forbes and Johnston, Canadian Companies and The Stock Exchanges (1980) 99.

303. Merger Report, 7.36.

304. See Old O.S.A.: sec. 110a, subsec. 109(2)(c); and subsec 82.9.

305. Forbes, supra n.302 at 99. This resulted from the attempted take-over of Great Lakes Power Corp. by Acres Ltd. in 1972. See P. Mathias, Takeover (1976) at 17.

306. Forbes, id.

307. For the complete story of the Abitibi-Price take-over see the book by Mathias, supra n.305.

308. Alboini, supra n.146 at 664.

309. "How Abitibi Won Price - and Almost All Were Happy", Financial Post, Nov. 30, 1974, 1.

310. The O.S.C. threatened to suspend trading for 15 days: "Rethinking Take-Over Rules: A Securities Chief's Lessons from Abitibi", Financial Post, Dec. 28, 1974, 3.

311. "How Abitibi Won Price", supra n.309.

312. "Rethinking Take-Over Rules", supra n.310.

313. "Time to Spell Out Rules on Floor Bids", Financial Post, Nov. 30, 1974, 20.

314. In fairness to the O.S.C. there were other take-over bids effected through the stock exchanges at this time: the take-over of P.W.A. by National Trust acting for an undisclosed principal, the Alberta Government, in which a 97 percent position was

achieved in about three days (July 31 to Aug. 2, 1974); and the take-over of Cornat Industries Ltd. by Canadian Forest Products in 24 hours (Oct. 21 and 22, 1974). It is also true, however, that the T.S.E. was learning from its experience because the Abitibi-Price take-over in Nov. 1974 was handled much better. It was the first time that the period for which the bid was to remain open had been negotiated.

315. "Rethinking Take-Over Rules", supra n.310.

316. Alboini, supra n.146 at 665.

317. Id.

318. "In the Matter of Bralorne Resources Limited", 1976 O.S.C.B. 258 at 259 and 261.

319. Alboini, supra n.146 at 665.

320. McRory, supra n.37 at 14.

321. "Bralorne Resources Limited", supra n.318.

322. Alboini, supra n.146 at 666.

323. Good discussions of this take-over battle are found in: Alboini, supra n.146 at 666; and Lovecchio, supra n.93 at 5.

324. Apparently some shares, less than five percent, were acquired on the Toronto Stock Exchange as a "normal course purchase". See: Alboini, supra n.146 at 667.

325. Alboini, Id.

326. "Requests for Comments on Exemption for Take-over Bids Effected Through a Stock Exchange", O.S.C. Weekly Summary, week ending July 21, 1978, 2A.

327. Id. at 3A; Alboini, supra n.146 at 668. See also the discussion in Lovecchio, supra n.93 at 9.

328. The discussion of the bid that follows is from Alboini, supra n.146 at 668.

329. Id.

330. Id.; Ontario Regulation 310/79.

331. Toronto Stock Exchange General By-Law, Part XXIII, sec. 23.11.

332. Id., sec. 23.01.

333. New O.S.A., sec. 103.

334. Part XXIII, supra n.331, subsec. 23.01(1). See Alboini, supra n.146 at 680.

335. Toronto Stock Exchange, Notice to Members No. 1919, Nov. 7, 1979, "Current Procedure for Take-over Bids, Issuer Bids and Insider Bids Through the Facilities of the Stock Exchange" at 6.

336. Id. at 7.

337. Id. at 4.

338. Part XXIII, supra n.331, subsec. 23.03.

339. Id., subsec. 23.02(9).

340. Id., subsec. 23.02(6).

341. Notice to Members, supra n.335 at 5.

342. Id.

343. New O.S.A., subsec. 89(1) 12(b).

344. New A.S.A., subsec. 131(1)(j).

345. New O.S.A., subsec. 88(1)(k)(ii).

346. See supra n.314.

347. Baillie, supra n.258.

348. In addition to a trend towards large institutional investors, exemplified by the increased size and market involvement of mutual and pension funds, it should be noted that in at least three of the examples used in Chapter V it was a complaint by a sophisticated investors or financial institution that prompted Commission action:

(i) the complaint by Canada Permanent Trust during the Abitibi-Price take-over;

(ii) the complaint by Jack Daniels of Cadillac Fairview, and others of the same ilk, when A.E.C. acquired 28% of B.C.F.P.; and

(iii) the complaint by Dominik Dloughy, president of Maison Placement Canada Inc., concerning the adequacy of Turbo's follow-up offer for Merland.

It appears, therefore, that sophisticated or institutional investors, who would probably be in the market regardless, may be the ones who are really taking advantage of provisions designed to attract the small, unsophisticated investor into the market.